85-532

No. ———

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

SPORTS AND HEALTH CLUB, INC., d/b/a ST. LOUIS PARK SPORTS AND HEALTH CLUB, et al.,
*Appellants,*

vs.

STATE OF MINNESOTA, By MARILYN E. McCLURE, and her successor, IRENE GOMEZ-BETHKE, Commissioner, DEPARTMENT OF HUMAN RIGHTS,
*Respondent.*

On Appeal from the Supreme Court of Minnesota

# JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

1. Did the State of Minnesota violate the United States Constitution by infringing the appellants' First Amendment rights of free speech and free exercise of religion when it ordered them to curtail religious speech in the work place and when it ordered them to hire into policy-making management positions individuals whose moral, religious and life-guiding convictions and management philosophies conflicted with those of the appellants who are the principals of the closely held business?

2. Do the Findings of Fact, Conclusions of Law, and Orders of the Hearing Examiner dated April 26, 1984, and April 27, 1984, as affirmed by the Minnesota Supreme Court, unconstitutionally infringe upon appellants' free exercise of religion in violation of the First Amendment to the United States Constitution?

3. Do the Findings of Fact, Conclusions of Law, and Orders of the Hearing Examiner dated April 26, 1984, and April 27, 1984, as affirmed by the Minnesota Supreme Court, constitute an unlawful establishment of religion in violation of the First Amendment to the United States Constitution?

4. Do the Findings of Fact, Conclusions of Law, and Orders of the Hearing Examiner dated April 26, 1984, and April 27, 1984, as affirmed by the Minnesota Supreme Court, deprive appellants of their right to freedom of association and freedom of speech in violation of the First Amendment to the United States Constitution?

5. Is the Minnesota Human Rights Act, Minn. Stat. Ch. 363.01 (1984), unconstitutional on its face or as applied to the appellants, in that it (as construed by the Minnesota Supreme Court) deprives appellants of their First Amendment rights to freedom of speech, freedom of exercise of religion, freedom from the establishment of religion, and freedom of association, under the Constitution of the United States?

6. Is the Minnesota Human Rights Act, Minn. Stat. Ch. 363.01 (1984), void for vagueness or unconstitutionally overbroad?

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*Respondent.*

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On Appeal from the Supreme Court of Minnesota

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## JURISDICTIONAL STATEMENT

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### OPINIONS BELOW

The Findings of Fact, Conclusions of Law, Orders and Memorandum of the Hearing Examiner dated April 26, 1984, and the Orders and Memorandum of the Hearing Examiner dated April 27, 1984 have not been reported in any official or unofficial reporter. Copies of the April 26, 1984 Findings of Fact, Conclusions of Law, Orders and Memorandum and the revisions made thereto by letter dated May 9, 1984 are annexed hereto respectively as Appendix

B at page A-72, and Appendix C at page A-205. A copy of the April 27, 1984 Order is annexed hereto as Appendix D at page 212.

The opinion of the Minnesota Supreme Court, Peterson and Yetka, JJ., dissenting, was filed on May 17, 1985. *In the Matter of the State of Minnesota v. Sports and Health Club, Inc.* 370 N.W.2d 844 (Minn. 1985). A copy of this opinion is annexed hereto as Appendix A at page A-1.

## GROUNDS UPON WHICH JURISDICTION IS INVOKED

### (i) Nature of Proceeding

In this action, the acting Commissioner of the Minnesota Department of Human Rights sought to enjoin the appellants from speech and action which the State alleged to be in violation of the Minnesota Human Rights Act, Minn. Stat. Ch. 363.01 (1984). The appellants asserted that the Minnesota Human Rights Act, facially and as applied, unconstitutionally infringed upon their rights of freedom of religion, freedom of speech, and freedom of association, and that it is void for vagueness and overbreadth.

The case was heard by a state administrative tribunal (hearing examiner) pursuant to the Human Rights Act. The hearing examiner (recently retitled administrative law judge) issued a comprehensive and sweeping injunction, enjoining speech and actions by the appellants. The appellants obtained a Writ of Certiorari from the Minnesota Court of Appeals. Before the Court of Appeals heard the case, the Minnesota Supreme Court granted accelerated review. A divided Minnesota Supreme Court affirmed.

### (ii) Relevant Dates

Judgment of the Minnesota Supreme Court: June 28, 1985.

Order of Minnesota Supreme Court denying Petition for Rehearing: June 28, 1985.

Notice of Appeal filed: July 26, 1985, in the Minnesota Supreme Court.

### (iii) Jurisdictional Basis

The statutory provision believed to confer jurisdiction of the appeal on this Court is 28 U.S.C. §1257(2), and alternatively, 28 U.S.C. §1257(3) and §2103.

## PROVISIONS INVOLVED IN CASE

U.S. Const. Amend. I:

> Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. Amend. XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.
>
> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Minnesota Human Rights Act, Minn. Stat. Ch. 363.01 (1984) is reprinted in full as Appendix L hereto. Particularly pertinent provisions are as follows:

Minn. Stat. §363.03, subd. 1 (1984):

> Except when based upon a bona fide occupational qualification, it is an unfair employment practice:
>
> * * * *

(2) For an employer, because of race, color, creed, religion, national origin, sex, marital status, * * * disability, or age,

(a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or

(b) to discharge an employee; or

(c) to discriminate against an employee with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

* * * *

(4) For an employer * * * before a person is employed by an employer * * * to

(a) require the person to furnish information that pertains to race, color, creed, religion, national origin, sex, marital status * * *.

Minn. Stat. §363.03, subd. 3 (1984):

It is an unfair discriminatory practice:

To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex. * * *

Minn. Stat. §363.101 (1984):

In addition to all other remedies provided under this chapter, every person who commits an unfair discriminatory act as set forth in section §363.03, subdivision 3, or aids, abets, incites, compels, or coerces another to do so, shall be guilty of a misdemeanor.

## STATEMENT OF THE CASE

The appellants in this matter, Arthur Owens, Marc Crevier, and Forest Larson, are the owners and operators of seven Sports and Health Club operations in the Minneapolis-

St. Paul metropolitan area. Taken together, the seven operations are Appellant Sports and Health Club, Inc., a closely-held Minnesota corporation. Owens is the President, and Crevier and Larson are Vice-Presidents of the clubs. The Sports and Health Clubs provide recreational and exercise facilities as well as counseling regarding appropriate exercise programs for the 18,000 members. Approximately 140 to 150 people are employed by the clubs.

Owens, Crevier and Larson are men of strong religious belief and commitment. They are, in their own words, "born-again," "evangelical," and "fundamentalist" Christians. As fundamentalist Christians, they believe "that both the Old and New Testaments, in their original texts, are *verbally* inspired of God (citing *Matthew* 5:17-18, 2 *Timothy* 3:16-17, and 2 Peter 1:21 and 3:16) and accordingly are inerrant and the complete and supreme authority in faith and life." *In the Matter of the State of Minnesota v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 856 (Minn. 1985) (Peterson, J., dissenting) (A-27).

Owens, Crevier and Larson each believe that Jesus of Nazareth was and is divine, was and is the Christ, was and is God incarnate, was crucified and bodily resurrected and lives today and forever as Creator, Maintainer, and Ruler of the entire universe. Each believes that every person will ultimately be judged by God as to whether his life has been lived in obedience to the purpose and will of God as revealed in the Bible, and that the eternal destiny of each person hangs in the balance of that judgment. Accordingly, Owens, Crevier and Larson have each made a personal commitment to Christ that they shall follow His teachings in each and every aspect of their individual lives—familial, social,

educational, business, and everything else. Therefore, in the operation of the Sports and Health Clubs they are very evangelical in speaking their Christian faith and distributing Christian literature. They advise prospective employees during job interviews of the existence of the fervent evangelical Christian faith of the owners/operators and some of their employees, and question such prospective employees to determine whether frequent and open expressions of such faith may offend them. The employees' work rules formulated by the owners/operators of the clubs reflect a system of authority which requires a high degree of discipline and a joyful and happy spirit. They will not knowingly hire, and thus subsidize, persons who are involved in fornication, adultery, homosexuality, or who are otherwise openly contemptuous and violative of God's moral laws. A fourteen-foot wide sign with a scriptural quotation hangs in the main office. Evangelical Christian placards, pamphlets, magazines and books are placed in the lounges and other public areas of the clubs. Bible studies are held in the afternoon and all employees are encouraged to attend, although only management employees are required to do so.

There is no dispute but that "[t]he religious beliefs of the owners are clearly legitimate." Their "convictions are deeply held, supported in Biblical scripture, and sincere." 370 N.W.2d at 846 (A-4). As stated by the administrative law judge:

> There is no dispute that the [appellants'] religious beliefs which they rely upon to justify their actions are legitimate and sincere. The complainant has stipulated to this, and the hearing examiner is similarly convinced.

(Opinion of Hearing Examiner, at page 65) (A-190). The appellants operate the Sports and Health Clubs as "a discipleship for Christ." *Id.*

The Minnesota Department of Human Rights brought an administrative action against the appellants on behalf of eleven members, employees and prospective employees, claiming that the appellants' speech and operation of the clubs constituted discrimination on the basis of religion, sex, and marital status, in violation of the Human Rights Act, Minn. Stat. Ch. 363.01 (1984). The department sought to enjoin the appellants from a broad range of speech and conduct, and to obtain the imposition of damages and criminal sanctions. The alleged discriminatory conduct is summarized in the hearing examiner's Findings of Fact:

> Every person who applies for an employment position * * * and who will be dealing with the public * * * must be interviewed and approved by the respondent's President, Arthur Owens, prior to hire. Neither Owens, his Vice Presidents, or his Club managers will hire anyone who, in their view, is "antagonistic to the Gospel." In order to ascertain this, the respondents inquire into the applicant's religion. It is the respondents' sincere belief that a person's "religion" permeates, motivates and directs every thought and action in a person's life, and, in order to find out "what kind [of] a person" they are, "religious" inquiries are made.
>
> * * * *
>
> Owens' employment interviews include reviewing the application and asking questions of the applicant to ascertain information on their [sic] religious views, their [sic] marital status and living arrangements. He explains to each prospect that the Sports Health Clubs are a "Christian organization," that many of the employees are fervently evangelical, and asks whether the interviewee would be "uncomfortable" in such an atmosphere. Owens maintains that a technical background in sales, exercise

and/or nutrition are less important to him than two basic qualifications for employment. They are that the applicant (1) possesses a "teachable spirit" and (2) follows a "disciplined life style". * * * [A]pplicants have been asked * * * to describe in detail their religious beliefs and practices; to give their reaction to respondents' religious beliefs and practices * * *; to describe in detail their family lives, including the marital status of themselves and their parents, whom they live with, and if they live "out of wedlock". Women applicants have been asked * * * if young and single, whether they have their father's (or parents') permission to work; if young and single and living away from home, whether they have their father's (or parents') permission to do so; if married, whether they have their husband's permission to work. * * *

The decision to operate the Sports and Health Clubs as a "discipleship" for Christ was made at a time when the organization was in severe financial trouble and almost went bankrupt. Since that time, the clubs' financial situation has become progressively more prosperous. Owens attributes the turnaround to his decision to take on his "Jewish business partner," Jesus Christ.

* * * *

In the mid-1970's, * * * Head Receptionist Merle Fisher started Bible studies for employees * * *. Ms. Fisher continued to have Bible studies in her home after she left the employ of Sports and Health in 1976, and conducts them to this day. Certain of respondents' employees still attend.

In approximately 1980, Bible studies for employees began to reappear at the Sports and Health Clubs. Owens had conducted Bible studies in his home * * * and he had invited Larson and Crevier. Inspired to spread the Word to others by the message and material presented to them at Owens' residence, the two Vice Presidents began

> to institute Bible studies for employees at the Clubs they ran. * * * Attendance is, and has always been, voluntary, but encouraged. * * *
>
> Bible studies for management personnel have been required at Sports and Health Clubs, Inc. since Owens decided to run the Clubs as a "discipleship" in the mid-1970's. * * *

Opinion of Hearing Examiner, at page 3-8, Appendix A-84 to A-85,

The Sports and Health Clubs have had, and continues to have, in its employ married persons, male and female unmarried persons, divorced males and females, and males and females of various races and colors. The Sports and Health Clubs have also employed, and continue to employ, persons of various religious faiths—Jews, Roman Catholics, Protestants of various denominations, and others—as long as such persons are not offended by the Christian faith of the owners/operators of the clubs, are not antagonistic toward the Christian gospel and will comply with the management's work rules for employees in a cheerful and obedient spirit. *In the Matter of the State of Minnesota v. Sports and Health Club, Inc.*, 370 N.W.2d at 848. The purpose of the appellants' preemployment inquiries is as follows:

> Owens — or sometimes one of the vice president if managerial employees were not involved — undertook * * * to learn if an applicant had a "teachable spirit" and a "disciplined lifestyle", somewhat interchangeable attitudinal terms. * * * These objectives involved inquiry into family and marital status, for two reasons: first, if it revealed an immoral relationship, Owens was not willing to subsidize it with employment; second, if the applicant came from a disciplined home environment, it

> revealed a favorable likelihood that the applicant had learned submission to authority, acceptance of a task to be done, and capacity to complete that task. Owens considered that employees who resisted authority and instruction demonstrated, in Owens' words, a "lack of *enthusiasm*. They're not able to do, and they don't want to do, these task things to reach the goals that we have set for them." (emphasis supplied). Owens believes, not surprisingly, that a person's religion—if any— "permeates, motivates, and directs every thought and action of that person's life", private and public.

*Id.*, Slip Op. at A-29. (Peterson, J., dissenting). It is only in the case of *managerial* employees that the employee must be a "born again" or "growing" Christian. *Id.*

The appellants' religious beliefs make it impossible for them to separate their personal and business lives from their lives in harmony in Jesus Christ, whom each has accepted as the Lord of his life and as his personal savior at the time of his spiritual "rebirth". (Opinion of Hearing Examiner, at 4). There is no dispute but that the appellants' religious beliefs require the speech and actions detailed above. As stated by the hearing examiner:

> Arthur Owens and his two Vice-Presidents are sincere individuals who truly believe that they are following God's direction, as expressed in the Bible, when they ask religious-based questions designed to uncover "what kind of person" they are speaking to. They are truly sincere in their belief that they are compelled by God to evangelize and proselytize to everyone in order to help guide the listeners into a way of life and belief system that God commands human beings to follow.

* * * *

> The Respondents have ably shown how their job descriptions, personnel policies, and conduct of the clubs' operations relate back to and are based upon scripture. In this, they have succeeded in persuading the Hearing Examiner that all of the decisions regarding the charging parties are connected to the exercise of their religious beliefs.

Opinion of Hearing Examiner, at 65, 72. *See also, In the Matter of the State of Minnesota v. Sports and Health Club, Inc.*, 370 N.W.2d at 852 ("Here, the Commissioner concedes, and the record amply supports, that the employment actions taken by Sports and Health, through its sole owners, was the result of deeply held and sincere religious beliefs.") (A-16).

The hearing examiner held that the speech and management policies of the appellants constitute "discrimination" on the basis of religion, sex and marital status in employment and public accommodation. Specifically, the hearing examiner held that the charging parties had been subjected to discrimination as follows:

1. *Joseph Williams*—questions about his religious beliefs and discussion of the religious beliefs of management when discussing possible employment violated Minn. Stat. §363.03, subd. 1(4)(a), which prohibits an employer from requiring a person to furnish information which "pertains to * * * religion" prior to employment.

2. *Robin Carnahan and Beverly Larsen* — questions about their religious beliefs when hired, and their ultimate discharge due to their negative attitude toward the religious work environment, violated Minn. Stat. §§363.03, subd. 1(2)(b) and 1(2)(c), as a discharge and a refusal to upgrade their employment "because of religion".

3. *Robert Severin*—discharge after his criticism that the staff was not as motivated as it had been under prior (non-religious) management violated Minn. Stat. §363.03, subd. 1(2)(b) as a discharge "because of religion".

4. *Steven Bruhjell*—failure to attain promotion to management due to his open disagreement with Owens' religious beliefs violated Minn. Stat. §363.03, subd. 1(2)(c) as a refusal to upgrade his employment "because of religion".

5. *Katherine Lamannsky*—questions about her divorce and statements by Crevier about Bible teachings on divorce when discussing possible employment violated Minn. Stat. §363.03, subd. 1(2)(a), as a refusal to hire "because of * * * marital-status".

6. *Marilyn Crosby and Linda Perkins*—refusal to hire them because they lived with their boyfriends violated Minn. Stat. §363.03, subd. 1(2)(a), as a refusal to hire "because of * * * marital status".

7. *Miriam Cameron*—discussion (*which was initiated by Cameron*) between Cameron, who was a member of a club, and Crevier about religious issues violattd Minn. Stat. §363.03, subd. 3, as a denial of full and equal enjoyment of a place of public accommodation "because of * * * religion".

*See* Opinion of Hearing Examiner, at 8-19 (A-86 to A-102); *In the Matter of the State of Minnesota v. Sports and Health Club, Inc.*, 370 N.W.2d 868-72 (Peterson, J., dissenting). (A-52 to A-57). The hearing examiner also held that the appellants' policy of not hiring young unmarried women who live away from home without the permission of their parents, or who do not have their permission to work, and of not hiring married women who do not have their hus-

bands' permission to work, was a violation of Minn. Stat. §363.03, subd 1(2), as discrimination "because of * * * marital status". *Id.* at 867 (A-105).

The appellants contended that the Act, facially and as applied, unconstitutionally infringed upon their rights of freedom of speech, free exercise of religion, and freedom of association; that the Act constituted an establishment of religion; and that the language of the Act was vague and overbroad. All of these contentions were rejected by the hearing examiner. Instead, the hearing examiner issued an order requiring the appellants to pay the complainants damages, and issued a sweeping injunction which prohibits the appellants from:

—refusing to hire any person because of that person's religious beliefs or practices;
—refusing to hire any person because of that person's objection or hostility to the appellants' religious beliefs or practices, *or* to the religious beliefs or practices of any other employee;
—inquiring into the religious beliefs or practices of any prospective or current employee;
—taking any adverse action against any employee because of that employee's religious beliefs or practices;
—refusing to take into management any person based upon that person's religious beliefs or practices;
—requiring, soliciting, or suggesting that any employee attend Bible studies or participate in any other religious exercise or practice;
—taking any adverse action against any employee because of non-participation in Bible studies or other religious exercises;
—taking any adverse action against any employee who objects or is hostile to the religious practices or exercises of management or of any other employee;

—refusing to hire any person because of marital status;
—requiring any prospective employee to furnish information pertaining to marital status;
—denying a management position to any person based upon that person's marital status;
—refusing to hire any young, unmarried woman who lives away from home without her parents' consent, because of that lack of consent;
—inquiring of any young, unmarried woman as to whether she has her parents' consent to live away from home;
—refusing to hire any young, unmarried woman who does not have her parents' consent to work, because of the lack of that consent;
—inquiry of any married woman as to whether she has her husband's consent to work;
—"harrassment" or "ridicule" of any member or guest because of religion.

*See* Opinion of Hearing Examiner, at 20-22.

The hearing examiner's primary Findings, Conclusions and Orders were issued on April 26, 1984. By Order dated April 27, 1984, the hearing examiner certified four classes of complainants and ordered notice to potential class members. On May 1, 1984, the hearing examiner issued an Order staying the effect of his prior Orders until May 21, 1984, to allow the appellants time to perfect an appeal. The appellants obtained a Writ of Certiorari from the Minnesota Court of Appeals on May 7, 1984. On May 21, 1984, the Chief Judge of the Court of Appeals granted an extension of the stay of the hearing examiner's Order until the Minnesota Supreme Court could act upon the appellants' motion for accelerated review by that Court.

On August 29, 1984, the Minnesota Supreme Court

granted the petition for accelerated review. In the Supreme Court, appellants again asserted that the Minnesota Human Rights Act, facially and as applied, unconstitutionally infringed upon their rights of freedom of speech, free exercise of religious convictions, and freedom of association. The Court issued its opinion on May 17, 1985. In that opinion, a divided Court upheld the hearing examiner's orders and rejected the appellants' Constitutional challenges. The Court acknowledged that the appellants' religious convictions "are deeply held, supported in Biblical scripture, and sincere." *In the Matter of the State of Minnesota v. Sports and Health Club, Inc., supra,* 370 N.W.2d at 846 (A-16). It also acknowledged that the appellants' "religious practices and beliefs spill over into, and in fact require, their employment practices"; "that the employment actions taken by Sports and Health, through its sole owners [were] the result of deeply held and sincere religious beliefs"; and "that the Minnesota Human Rights Act abridges those beliefs." *Id.* 370 N.W.2d at 846 (A-16). The Court held, however, that the State's "compelling interest in prohibiting discrimination in employment and public accommodation" justified the hearing examiner's actions; and that no less restrictive means was available. *Id.*, 370 N.W.2d at 853 (A-16). No discussion of the speech or association issues appears.

Justices Peterson and Yetka dissented. In a forty-two page dissent, Justice Peterson stated that "[t]he issues presented in this case are of as profound importance as any raised in my eighteen years on this Court, issues of important constitutional principle." *Id.*, 370 N.W.2d at 854, 855 (Peterson, J., dissenting) (A-22). He stated that "[t]his case is unique * * *, because a statute designed to protect the religious from discrimination has been invoked by the merely nominally religious against Owens, a man of strong religious belief and commitment." *Id.* 370 N.W.2d at 855. He stated:

> The examiner's disposition of the basic issue in this case was as sweeping as it was superficial: Owens' religious beliefs are sincere but, when put into practice in a commercial service business, simply irrelevant. * * * The examiner * * * decrees a dichotomy between Owens' beliefs and practices, divorces the sacred from the secular, does not distinguish praying on one's knees on Sunday from preying on other persons in the marketplace on Monday, and perceives no significant difference between the commitment of conviction and the detachment of a possibly more casual Sabbath ceremony or community convention.
>
> * * * *
>
> [T]he examiner, in his findings, conclusions, and orders, interpreted the statute not only in a "liberal" fashion but in a remarkably extravagant way.
>
> On the other hand, the three-factor constitutional analytical framework has the opposite mandate, for it imposes restrictions against intrusions upon fundamental and overriding civil liberties. The examiner acknowledged, as to the first factor, that the sincere religious beliefs of Owens were burdened by the Act, but with respect to the second and third factors, he did no more than make the uncritical declaration that the burden was justified by a compelling state interest, without less restrictive alternatives of interpretation or enforcement.

*Id,* 370 N.W.2d at 859, 864 (A-44)). Justice Peterson noted the "unwarranted sweep of the cease and desist orders"; and that the Examiner's injunction against the appellants' "soliciting or suggesting participation in Bible studies" is "so patently unconstitutional as to require no other comments beyond identifying it". *Id.*, 370 N.W.2d

at 868, 870 (A-52, A-57). He also stated that "[i]t is preposterous to impose sanctions upon an employer, particularly this employer, who refused to employ persons whose conduct constitutes criminal misbehavior"; and that [t]o hold, as here, that a vigorous and robust debate on a religious subject, however controversial, may be statute or administrative order be prohibited or made subject to a monetary penalty is a most flagrant denial of freedom of speech." *Id.*, 370 N.W.2d at 872, 873 (A-61).

Justice Yetka also dissented, stating:

> Here is an [a]ct which has as its stated purpose the elimination of discrimination in employment. It has been rightly invoked to protect minorities—in color, gender, and religion. Yet, it would discriminate against the majority religion in the United States since the nation's founding, namely, Christianity. This decision would deny a Christian the right to practice his belief in the marketplace. It would deny an employer the right to basic information about a prospective employee that affects not only the well-being of the employer and his business, but also that of the propspective employee's fellow employees. I find the findings so repugnant that it reaches the stage of being ridiculous.

*Id.*, 370 N.W.2d at 876 (Yetka, J., dissenting) (A-70). In short, in this case the Human Rights Act is not a shield against discrimination, but a sword for it.

On June 28, 1985, the Minnesota Supreme Court denied that appellant's Petition for Rehearing, but granted a stay of the effect of the hearing examiner's orders for forty-five days in order that the appellants could perfect an appeal to the Supreme Court of the United States. That stay has

expired. Judgment was entered by the Minnesota Supreme Court on June 28, 1985. The appellants' Notice of Appeal was filed on July 26, 1985.

## SUBSTANTIALITY OF FEDERAL QUESTIONS

This case presents questions of profound and fundamental constitutional importance:

1. May a State, through the imposition of civil and criminal sanctions and injunctions, prevent the owners or operators of a business from exercising their religous beliefs in the operation of that business, on the ground that employees or patrons are entitled to a "morally neutral" environment (a Scriptural impossibility—*Matthew* 6:24) under the State Human Rights Act?

2. Where the beliefs and philosophy of an employer stem from deeply held and sincere religious convictions, may a State, solely because the beliefs are religious, through the imposition of civil and criminal sanctions and injunctions, compel the employer to hire or promote into management positions persons who are antagonistic and hostile to the beliefs and philosophy of the management of the employer and who are hostile to the beliefs of other employees (a Scriptural prohibition—2 *Corinthians* 6:14)?

3. May a State, through the imposition of civil and criminal sanctions and injunctions, prevent an employer from discussing religious or moral issues with employees or patrons, or suggesting participation in religious learning experiences or practices (a Scriptural mandate—*Mark* 16:15) on the ground that the speech is in violation of the State Human Rights Act?

4. May a State, through the imposition of civil and criminal sanctions and injunctions, compel an employer to hire persons who are living in violation of the state's criminal laws against fornication and sodomy (*See* Minn. Stat. §§ 609.34, 609.273), and forbid that employer from making an inquiry into the moral values of prospective employees, on the sole ground that the employer's actions are motivated by religious beliefs?

First among the Amendments to the United States Constitution is the admonishment that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof". These prohibitions apply equally to the States and their legislatures through the Fourteenth Amendment. *Chaplinsky v. State of New Hampshire,* 315 U.S. 568, 571 (1942); *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).

This Court has long held that the Religion Clauses of the First Amendment must be regarded by the courts as protecting liberties of the highest order. As stated by this Court in *Wisconsin v. Yoder,* 406 U.S. 205 (1972):

> [T]he Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by the government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. * * *
>
> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

*Id.* at 214-215.

Freedom of conscience and religious belief cannot be restricted by law. *Cantwell v. Connecticut, supra* at 303. The First Amendment also safeguards the free exercise of the chosen form of religion. "Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. * * * In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Id.*, at 303-304.

A challenge to state action under the Free Exercise Clause must begin with a consideration of the nature and extent to which the state action interferes with or burdens the free exercise of religious beliefs. *United States v. Lee,* 455 U.S. 252, 256-257 (1982); *Wisconsin v. Yoder, supra* at 220. Second, the state must justify the limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. *United States v. Lee, supra* at 257-258; *Wisconsin v. Yoder, supra,* at 214. Inherent in determining whether the limitation is essential to the governmental interest is consideration of whether accommodation by the state would "unduly interfere with the fulfillment of the governmental interest," *United States v. Lee, supra* at 259, and whether the governmental regulation is the "least restrictive means" of promoting the governmental interest. *Thomas v. Review Board of Indiana Employment Security,* 450 U.S. 707, 718 (1981).

There is no question but that the religious beliefs of the appellants are sincere, legitimate, and of deep-seated resolve. There is also no question but that the appellants' religious beliefs require them to conduct *all phases* of their lives,

including their business endeavors, in accordance with Biblical teachings and the law of God, and that the speech, actions, and management philosophy which are prohibited by the State in this case are required by the appellants' religion.

The burden which is imposed upon the appellants in this case is prohibitive and complete. Because of their religious convictions, they will have no recourse but go out of business if the State Human Rights Act is enforced against them as sought by the State. The right to free exercise of religion which is guaranteed by the federal constitution will be meaningless to them. Any business that they enter which involves the hiring of employees or the rendition of service in a place of accommodation will be "off limits" to them because of their compulsion to follow Biblical teachings. They will be prohibited from speaking to employees or others in the market or business place under the constant threat that if they are open and evangelical in their faith, a complaint of religious discrimination will be filed with State authorities. Enforcement of the hearing examiner's orders will effectively abolish the appellants from the business community—all because they openly proclaim and act in accordance with their Christian beliefs. As acknowledged by the State and by the Minnesota Supreme Court, enforcement of these orders will not only burden, but will completely abridge, the exercise of the appellants' religious beliefs. *In the Matter of the State of Minnesota v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 852 (Minn. 1985).

The State contends that this abridgment is justified by the State's compelling interest in eliminating all forms of discrimination. What the State ignores is that the orders in this case do not effectuate an end to discrimination on the

basis of religion, sex or marital status in the hiring of employees; the appellants already hire persons of all religions, both sexes, and any marital status. What the State has accomplished, instead, is discrimination against the religion of the Appellants by decreeing that all questioning or speech which deals with moral values, all questioning or speech which is designed to determine the attitude of the prospective employee toward the religion of the appellants and other employees, and all other speech or discussion about religious issues by the appellants with employees or patrons, must be supressed *because* it is the product of their religious beliefs.

There is no doubt but that a prospective employee's views on moral (and perforce religious) issues are not only relevant but are solicited by employers. There is no doubt but that views on abortion could be elicited before an employee is hired to work in a medical office in which abortions are performed, or to work in a "right to life" organization. There is no doubt but that views on homosexuality or gay rights could be elicited by an employer whose clientele is largely homosexual. What the State has decreed in this case is that a Nazi must be hired to work, and promoted to management, in a business owned by Jews; that an employee who is openly contemptuous and derisive of "Born Again" Christianity, must be hired to work, and promoted to management, in a business owned by "Born Again" Christians. Never before has a state's interest in "eradicating discrimination" been used to eradicate religious speech and exercise, *solely because* it is religious.

Indeed, in this case the Human Rights Act which is intended to protect against discrimination has become an instrument of discrimination. Under the guise of protecting

prospective employees from discrimination, the state is undertaking to eliminate the right of born again Christians from exercising the scriptural mandates in the market place. The Act is being used to suppress religious expression. The shield of protection has become a sword of destruction.

Accommodation of the appellants' religious rights would not interfere with the fulfillment of any valid governmental objective. In the case of the initial hiring of employees, the appellants *do not* refuse to hire persons based upon their religion, sex, or marital status. It is only with regard to the promotion to policymaking management positions that the appellants' require that the employee be a "growing Christian." This is based upon the Biblical injunction that they not be "unevenly yoked" with nonbelievers. (2 Corinthians 6:14-18). There is no evidence in this record to indicate that the granting of an exemption to the appellants in the case of management employees would lead to widespread claims of such religious beliefs, or would otherwise unduly impede the State's interests. *See Thomas v. Review Board of Indiana Employment Security, supra* at 707; *Wisconsin v. Yoder, supra* at 221.

Moreover, it is incumbent upon the State to demonstrate that no lesser form of regulation would effectuate the State's interests. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963). In this case, the Hearing Examiner has issued a sweeping injunction which is aimed at the complete eradication of Appellants' moral and religious values from their speech and actions in the marketplace. Surely this is not the "least restrictive alternative" available to serve the State's narrow interest in preventing discrimination based upon sex, religion, or marital status in employment or public accommodation.

In this highly sensitive Constitutional area " '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' " *Sherbert v. Verner, supra,* at 406. Restrictions on the free exercise of religion are allowed only when it is necessary to prevent grave and immediate danger to interests which the state may lawfully protect." *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943). Nor is speech any less protected because it is religious in nature. *See Heffron v. International Society for Krishna Consciousness,* 425 U.S. 640, 647 (1981).

Appellants are not unaware of the fact that the activities of individuals, even when religiously based, are often subject to State regulation. *See Wisconsin v. Yoder, supra,* at 220. "But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment * * *." *Id.* Conduct is inextricably intertwined with religious belief; "in this context belief and action cannot be neatly confined in logic-tight compartments." *Id.* Because of the need for speech and expression for religious belief to live and thrive, this Court has upheld state regulation of religiously-based conduct only when it has posed some substantial threat to public safety, peace or order. *Sherbert v. Verner, supra* at 403.

The State's prosecution of the appellants in this case raises an issue of fundamental importance: can the State impose and enforce a complete divorce between religious belief and practice in everyday life? The State's action in this case decrees that persons must live two disparate, compartmentalized lives—one secular and one spiritual. There are two days (at most) for worship—they are spiritual; the rest of

the week is secular. To these appellants, and to millions of others throughout this country and around the world, nothing could be further from the truth. For them, their religion is a 100% full-time practice. It permeates, governs and controls their every thought, word and deed. To demand that a person with such religious convictions act in accordance with them on some occasions, and not on others, is to ask for the impossible.

The First Amendment requires the State to be neutral in its relations with religious believers and non-believers. "State power is no more to be used so as to handicap religions than it is to favor them." *Everson v. Board of Education,* 330 U.S. 1, 14-15 (1947). "[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do not believe.' " *Abington School Dist. v. Schempp,* 374 U.S. 203, 205 (1963), quoting *Zorach v. Clauson,* 343 U.S. 306, 314 (1952). If the purpose or the primary effect of a State enactment "is the advancement *or inhibition* of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Id.,* at 222 (emphasis added). The State's prosecution of Appellants' speech and conduct, solely because of its religious fiber, is an unconstitutional establishment of secularist beliefs. Such state action is prohibited by the Constitution. As stated in *Engel v. Vitale,* 370 U.S. 421 (1962):

> Under our Bill of Rights, free play is given for making religion an active force in our lives. But "if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government." *McGowan v. Maryland,* 366 U.S. 420, 563, 81 S.Ct. 1101, 1219, 6 L.Ed.2d 293 (dissenting opinion).

> * * * The First Amendment leaves the Government in a position not of hostility to religion but of neutrality.

*Id.*, at 442-443 (Douglas, J., Concurring).

This case presents questions of fundamental importance to all persons who wish to live their lives in accordance with deeply-held religious convictions. The action by the State against these appellants is direct and severe. The Constitutional issues involved are of paramount importance and deserve plenary consideration by this Court.

Respectfully submitted,

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Dated: September 24, 1985.

85-532

No. ———

Supreme Court, U.S.
FILED
SEP 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

SPORTS AND HEALTH CLUB, INC., d/b/a ST. LOUIS PARK SPORTS AND HEALTH CLUB, et al.,
*Appellants,*

vs.

STATE OF MINNESOTA, By MARILYN E. McCLURE, and her successor, IRENE GOMEZ-BETHKE, Commissioner, DEPARTMENT OF HUMAN RIGHTS,
*Respondent.*

On Appeal from the Supreme Court of Minnesota

## APPENDIX TO THE APPELLANTS' JURISDICTIONAL STATEMENT

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# APPENDIX

## APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT

C4-84-771
CX-84-936

Kelley, J.
Dissenting, Peterson, J.,
and Yetka, J.
Took no part, Coyne, J.

Minnesota Department of Human Rights

In the Matter of the State of Minnesota, by Marilyn E. McClure, and her successor, Irene Gomez-Bethke, Commissioner, Department of Human Rights.

Respondent (C4-84-771)
Relator (CX-84-936)

v.

Sports and Health Club, Inc., d.b.a. St. Louis Park Sports and Health Club, et al.,

Relators (C4-84-771)
Respondents (CX-84-936)

Filed May 17, 1985
Wayne Tschimperle
Clerk of Appellate Courts

SYLLABUS

1. The Minnesota Human Rights Act. Minn. Stat. §363.01 (1983) et seq., facially and as applied does not

violate an employer's rights of free speech, free exercise of religion or freedom of association as guaranteed by the First Amendment to the United States Constitution and Article 1, Section 16 of the Minnesota Constitution.

2. Sole owners of a corporation which engaged in discriminatory employment practices are not liable as accessories under Minn. Stat. § 363.03, subd. 6, when the owners were the ones who discriminated and where the "corporate veil" was pierced by the hearing examiner in personally enjoining them from continuing those practices.

3. In determining whether to certify a class in a class action, the hearing examiner is limited to considering only the factors set forth in Minn. Rule 5000.1100 (1983).

Affirmed in part; reversed in part; and remanded for further certification proceedings.

Heard, considered and decided by the court en banc.

## OPINION

KELLEY, Justice

In this action against appellants Sports and Health Club, Inc. (Sports and Health),[1] the respondent, the acting Commissioner of the Minnesota Department of Human Rights (Commissioner) sought to enjoin certain actions of the appellants. These actions consisted of questioning prospective employees about marital status and religion; terminating employees because of a difference in religious beliefs; refusing to promote employees because of differing

[1]Arthur Owens, Marc Crevier, and Forest Larson, owners of Sports and Health Club, Inc. are also appellants. For convenience appellants will be referred to as Sports and Health unless otherwise indicated.

religious beliefs; and failing to provide "open" public accommodations. The matter was heard by a hearing examiner who found that, in fact, appellants had engaged in the asserted practices in violation of Minn. Stat. ch. 363 (1983) (Minnesota Human Rights Act). The hearing examiner enjoined continuation of those practices. Throughout these proceedings, appellants have asserted that the Minnesota Human Rights Act, facially and as applied, unconstitutionally infringes upon their rights of freedom of speech, free exercise of religion, and freedom of association. In addition, appellants challenge the sufficiency of the evidence to sustain the hearing officer's findings and conclusions of law, and the hearing examiner's order certifying classes, which they claim violates the same constitutional rights. The respondent Commissioner challenges the hearing examiner's order refusing to certify certain classes. Since we conclude that the Minnesota Human Rights Act does not impermissibly infringe upon appellants' constitutional rights, either facially or as applied to appellants, we affirm the hearing examiner. Because the class certification was unduly narrow in scope, we reverse the class certification order.[2]

Arthur Owens, Marc Crevier and Forest Larson own and operate Sports and Health Club, Inc., a closely-held, for-profit Minnesota corporation. Sports and Health Club, Inc. operates seven sports and health club operations in

[2]The procedural history of this case is somewhat convoluted. Sports and Health first sought review before the Minnesota Court of Appeals which was granted. Subsequently, Sports and Health's petition for accelerated review was granted by this court. The Commissioner moved the Minnesota Court of Appeals to dismiss Sports and Health's appeal on the ground the hearing examiner's orders sought to be appealed from were not final, and therefore unappealable. The Court of Appeals never decided that motion. Later the Commissioner filed her own appeal from

the Twin Cities metropolitan area. Each provides recreational and exercise facilities as well as counseling regarding appropriate exercise programs for 18,000 members. Approximately 140 to 150 people are currently employed by the clubs. The parties agree that the clubs' facilities are excellent, described by some as the "Cadillac of the industry." and that membership dues are generally lower than those of the competition in the Minneapolis-St. Paul metropolitan area.

Owens, Crevier and Larson are "born-again" Christians. Their fundamentalist religious convictions require them to act in accordance with the teachings of Jesus Christ and the will of God in their business as well as in their personal lives. These convictions are deeply held, supported in Biblical scripture, and sincere.[3]

The owners of Sports and Health admit their religious practices and beliefs spill over into, and in fact require, their employment practices. These practices consist of questioning prospective employees about marital status and religion, terminating other employees because of a difference in religious beliefs; refusing to promote employees because of differing religious beliefs; and failing

---

the hearing examiner in the Court of Appeals challenging the ruling that three individual defendants did not aid and abet the corporate appellants and the denial of class certification. The Minnesota Court of Appeals did not decide this motion. Later the Commissioner's petition to this court for acceleration of its appeal pending in the Court of Appeals and for consolidation with Sports and Health's appeal was granted. Meanwhile appellants moved to dismiss the Commissioner's appeal because she failed to file a brief in her appeal within 30 days required by Minn. R. Civ. App. P 131.01. Therefore, both motions to dismiss are before the court at this time.

[3]The religious beliefs of the owners are clearly legitimate. In addressing the issues here presented, we have scrupulously given due deference and consideration to these beliefs in reaching our decision.

to provide "open" accommodations. In some instances the practices were found illegal by the hearing examiner. In other instances, no allegations of illegality were asserted. In the operation of the clubs, the owners share an evangelical fervor to proselytize or convert others to their beliefs. The owners place book racks in the entrance of each club containing Christian literature. The state claimed no illegal conduct based on this action.

Interviews of all prospective employees, with the exception of locker-room attendants and babysitters, are conducted in violation of Minn. Stat. § 363.03, subd. 1(4)(a) (1982).[4] In those interviews, applicants were asked whether they attend church, read the Bible, are married or divorced, pray, engage in pre-marital or extra-marital sexual relations, believe in God, heaven or hell, and other questions of a religious nature. Sports and Health explains this practice as an attempt to advise prospective employees, during the interview, of the existence of the owners' fervent beliefs to determine whether their sincerely held beliefs may offend the prospective employee. Moreover, Sports and Health believes the answers to the questions will help the owners determine if the applicant (1) possesses a "teachable spirit" and (2) follows a "disciplined life style."

Sports and Health admits that only born-again Christians are permitted to be managers or assistant managers. The hearing examiner found this practice to be illegal

[4]Minn. Stat. § 363.03, subd. 1(4)(a) (1984) provides, in pertinent part, that "it is an unfair employment practice * * * [f]or an employer * * * to require [an applicant] to furnish information that pertains to * * * religion * * * sex, marital status * * *."

under the Human Rights Act. Sports and Health justifies this rigid policy by relying on their religious belief that they are forbidden by God, as set forth in the Bible, to work with "unbelievers." (*See 2 Corinthians* 6:14-18). Sports and Health also admits that Bible studies are a substantial part of weekly meetings for managers. Voluntary Bible studies are also held for all sales personnel.

Finally, based on an interpretation of the Bible, Sports and Health will not hire, and will fire, individuals living with but not married to a person of the opposite sex: a young, single woman working without her father's consent or a married woman working without her husband's consent; a person whose commitment to a non-Christian religion is strong; and someone who is "antagonistic to the Bible," which according to *Galatians* 5:19-21 includes fornicators and homosexuals. The hearing examiner found this practice to be in violation of Minn. Stat. § 363.03, subd. 1(2) (1984).[5] Sports and Health defended its hiring and firing actions on individual violations of rigid work rules based on the Bible (requiring a high degree of discipline and submissiveness, "backbiting" and "non-joyful" attitude on the part of the employee, and in the case of applicants not hired, on the lack of a "teachable

---

[5]Minn. Stat. § 363.03, subd. 1(2) provides, in pertinent part, that "it is an unfair employment practice * * * [f]or an employer, because of * * * religion, * * * sex, marital status * * *, (a) to refuse to hire * * * a person seeking employment; or (b) to discharge an employee; * * *."

[6]For instance, the Clubs use a "book" system for sales. Some of the feaures of the "book" system imposed are: "cold" calls to solicit potential members; a requirement to obtain a certain number of "referral" appointments (for prospective members) each week; requirements for the logging of "cold" calls and "referral" appointments; that each service of a member be recorded; that lists of clients and prospects be updated; that the members' programs be periodically updated; and recording of the periodic weighing and measuring of the members.

spirit" and "disciplined lifestyle," which the owners maintain are more important than a technical background in sales, exercise and/or nutrition.

Appellants assert the sincere belief that their practices were proper and lawful exercises of the rights of free speech, free exercise of religion and freedom of association guaranteed by the First Amendment to the United States Constitution and Article 1, Section 16 of the Minnesota Constitution. This assertion forms the main contention in this case

Despite all the discrimination allegations asserted in this case Sports and Health has employed, and continues to employ, married persons, male and female unmarried persons, and divorced males and females of various races. The Sports and Health clubs have also employed, and continue to employ, persons of various religious faiths—Jews, Roman Catholics, Protestants of various denominations, and others—so long as such other persons are not offended by the owners' faith, are not antagonistic toward the Christian gospel and will comply with management's work rules in a cheerful and obedient spirit.

(1) We address first the pending motions to dismiss.

(a) The Commissioner contends that Sports and Health's appeal from the hearing examiner's orders (C4-84-771) should be dismissed with respect to liability and class certification because the appeals are not from orders from which an appeal may be taken since they are not final within the meaning of Minn. R. Civ. App. P. 103.03. We need not address the issue in this case. We choose to grant discretionary review of the issues raised by Sports

and Health's appeal because this is one of those "appropriate cases where the interest of justice requires immediate review of liability determinations before the issue of damages has been litigated." *In re Commodore Hotel Fire & Explosion Case,* 318 N.W.2d 244, 247, n.2 (Minn. 1982), *see also Sigler v. First American National Bank* 325 N.W.2d 136, 137, n.1 (Minn. 1982). Sport and Health's appeal is before this court because we granted accelerated review. Rule 118 of Minn. R. Civ. App. P., providing for accelerated review, incorporates by reference the discretionary review found in Rule 117. The issues have been fully briefed in an adversarial proceeding. The interest of justice, in deciding all issues arising from the hearing examiner's order in one proceeding, compels us to the conclusion that discretionary review should be granted, and, accordingly, the Commissioner's motion to dismiss is denied.

(b) Sport and Health contends the Commissioner's appeal (Case CX-84-936) should be dismissed because the Commissioner did not file her brief within 30 days as required by Minn. R. Civ. App. P. 131.01. In fact the Commissioner has never filed the relator's brief in that appeal. However, the Commissioner did brief issues she raised in her appeal in her brief responding to the brief of Sports and Health in appeal C4-84-771. We note that Sports and Health's dismissal motion is technically meritorious. Minn. R. Civ. App. P. 142.02. However, this court did grant the Commissioner's petition for accelerated review and consolidation of her appeal (CX-84-936), with Sports and Health's appeal (C4-84-771) and ordered counsel on oral argument to be prepared to discuss the substantive issues raised in each appeal. In fact, counsel did discuss all issues

on oral argument, and, pursuant to leave of the court, Sports and Health did file a brief responding to issues raised by the Commissioner. Because no rights have been prejudiced, and since the parties have been given an opportunity to brief and argue the issues raised by the Commissioner, we will grant discretionary review of those issues in the interest of justice. *In re Commodore Hotel Fire & Explosion Cases, supra.*

(2) Turning to the merits, we address first Sport and Health's contention that the findings of fact, conclusions of law, and orders of the hearing examiner are "unsupported by substantial evidence in view of the entire record as a whole." Minn. Stat. § 14.69 (1982). In examining that contention, we are not permitted to substitute our view of the evidence for that adopted by the hearing examiner if substantial evidence in the record supports his decision. *See Dakota County Abstract Co. v. Richardson*, 312 Minn. 353, 356, 252 N.W.2d 124, 126-27 (1977). The test for determining whether a specific finding is supported by substantial evidence is whether the evidence, considered in its entirety, is (1) more than a scintilla of evidence; (2) such that a reasonable mind might accept it as adequate to support a conclusion; or (3) more than "some evidence" and more than "any evidence". *Taylor v. Beltrami Electric Cooperative, Inc.*, 319 N.W.2d 52, 56 (Minn. 1982). Where the evidence is conflicting or more than one inference may be drawn from it, the findings of the hearing examiner must be upheld. *City of Minneapolis v. Richardson*, 307 Minn. 80, 88, 239 N.W.2d 197, 202 (1976).

In a contested case such as this, the Commissioner must make a prima facie showing of discrimination as de-

fined by Minn. Stat. 363.03 (1982). The employer then has the burden to establish legitimate nondiscriminatory reasons for the actions taken. The Commissioner then has the burden of establishing that the reasons stated are a mere pretext for discrimination. *Hubbard v. United Press International Inc.*, 330 N.W.2d 428, 441, n.12 (Minn. 1983).

In this case there are numerous charging parties[7] In examining the claim of each charging party, the hearing examiner meticulously followed the procedure outlined in *Hubbard*. Several of the charges alleged that Sports and Health in its hiring practices violated the statute by making inquiry as to religious beliefs and practices and marital status. Other charges alleged that in promotion practices the same statutorily prohibited conduct occurred, while still others charged their employment was terminated because of their marital status and refusal to partake in religious classes at the place of business. Finally, one complainant, who was of the Jewish religious faith, alleges that she was forced to give up her membership in one of the clubs run by Sports and Health because Sports and Health, through its insistence upon displaying fundamentalist Christian religious literature in the literature racks and on the walls of the sports club, engaged in conduct that was offensive to her. In considering each complaint, the hearing examiner found a prima facie showing of discrimination. Sports and Health then presented evidence in an attempt to establish a legitimate and nondiscriminatory reason for the action taken. Sports and Health proferred evidence that the employees who were terminated had trouble with the "book system" (the basis of the clubs'

[7]A charging party is a person who claims he or she was illegally discriminated against by the employer.

membership solicitation efforts); that they had a bad and uncooperative attitude, that they had violated rules such as the use of intoxicants on the premises or the unauthorized "borrowing" of money from certain club funds; or that they did personal business while on the job, contrary to company rules; as well as other claims of rule violations. In each instance, the hearing examiner held that Sports and Health had advanced legitimate and nondiscriminatory reasons for the discharges. Sports and Health likewise offered evidence articulating reasons why certain complainants were not hired such as their rejection of religion, their "bad attitude", or that their personality was not such as to demonstrate an ability to get along with people.[5] The hearing examiner found that these reasons for Sports and Health's actions were generally legitimate. However, in considering both the claims of promotional discrimination and hiring discrimination, the hearing examiner found the articulated reasons for the actions taken were pretextual and the real reasons related to the employees' or applicants' religious beliefs, or lack thereof, and/or their marital status. Had we been the fact finder, we might have arrived at a different conclusion in some of these cases, but the record is replete in demonstrating that each of the charging parties had been questioned about marital status, religion, and, indeed, in several instances "preached at" by officers of Sports and Health at the time of their termination or application denial. We recognize that in order to make informed and intelligent employment decisions, employers must be permitted some leeway to question an employee or applicant about his

[5]One or two of this group, after being queried about attitude toward religion or marital status, did not pursue an employment application.

or her background, upbringing and perspective.[9] In this case, however, Sports and Health, in some instances, went far beyond legally permissible bounds in questioning applicants and employees. The evidence clearly substantiates the findings of the hearing examiner that questioning concerning religious beliefs, practices and concerning marital status permeated the employment process and were the true reasons for the actions taken by Sports and Health.[10]

(3) We come then to the crucial issue: do the findings of fact, conclusions of law and orders of the hearing examiner unconstitutionally infringe upon Sports and Health's freedom of speech, free exercise of religious beliefs, and freedom of association as provided by the First Amendment to the United States Constitution and Article 1, Section 16 of the Minnesota Constitution?[11]

(a) We address first a preliminary matter. The Commissioner, in her brief to this court, for the first time in this litigation raises the issue of whether Sports and Health has "standing" to raise the freedom to exercise religion issue. It is well settled that an issue not litigated below may not be asserted for the first time on appeal. *Mat-*

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[9]*See e.g.* 29 C.F.R. § 1604.7, 1605.3, 1606.6 (1984).

[10]Justice Peterson, in dissent, argues that the discrimination claim predicated upon questioning of employees and applicants on cohabitation of unmarried persons is not a ground under the statute for finding discrimination. Even though we agree with his contention, yet the record appears clear to us that Sports and Health went far beyond permissible bounds in questioning employees and applicants in areas clearly prohibited by the act.

[11]Both parties to this action have discussed in briefs and argument these three claims together. Although they are three distinct and separately guaranteed rights, the exercise of free speech in this case was pursuant to a deeply held religious conviction and the associational freedom that was exercised by Sports and Health was motivated by the same deeply held religious beliefs.

*ter of Welfare of K.T.*, 327 N.W.2d 13, 16-17 (Minn. 1982); *Republic National Life Insurance Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349, 355 n.2 (Minn. 1979). However, an objection to want of "standing" goes to the existence of a cause of action, is jurisdictional, and may be raised at any time, *Matter of Welfare of Mullins*, 298 N.W.2d 56, 61 n.7 (Minn. 1980). In this case, however, we conclude that Sports and Health (the corporation) has "standing" to assert its constitutional arguments. The issue here is not whether a corporation has "standing" to litigate, but rather whether Sports and Health has "standing" to assert the first amendment as a defense to the claims of discrimination. The Commissioner's conclusory assertion that a corporation has no constitutional right to free exercise of religion is unsupported by any cited authority. Though not precisely on point, the United States Supreme Court has permitted employers, corporate as well as individuals, to assert first amendment rights. *See e.g. First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978 )(freedom to speak on a referendum issue); *United States v. Lee*, 455 U.S. 252 (1982) (individual employer claimed that *his* rights of free exercise of religion were violated by a facially neutral governmental law—the Social Security Act). *See also Donovan v. Tony and Susan Alamo Foundation*, 722 F.2d 397 (8th Cir. 1983), *aff'd*, 53 U.S.L.W. 4489 (1985) (corporation asserted first amendment right of free exercise of religion in defense of alleged violation of minimum wage, overtime, and record keeping provisions of 29 U.S.C. 201 *et seq.*).

In this case, however, it is unnecessary to decide whether Sports and Health, a corporation, has a first amendment right to free exercise of religion. The hearing examiner

pierced the "corporate veil" to make the respondents (Owens, Crevier and Larson), who own all the stock and assets of the corporation, liable for the illegal actions of it. Whether the hearing examiner had legal authority to pierce the "corporate veil" is not before us on this review.[12] The fact remains that he did. By so doing, Owens, Crevier and Larson, in reality, are the ones asserting the first amendment right to the free exercise of religion. Thus, we conclude the Commissioner's "standing" argument presents no impediment to allowing the constitutional issue to be asserted in this case.

(b) Sports and Health argues that if the violations of the employment discrimination and public accommodation sections of the Minnesota Human Rights Act are sustained, such conduct is protected under the right to exercise religion under the United States and Minnesota Constitutions.[13]

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[12]The "piercing" doctrine by legal reasoning requires the conclusion that the corporation and shareholders are one and the same (a mere "alter ego"); that the corporation was set up merely to serve as a "buffer" for the shareholders for one reason or another. Moreover, the hearing examiner worked from the assumption that Crevier, Larson and Owens were exercising their first amendment rights through Sports and Health. No corporate question was involved in hearing examiner's memorandum. Finally, Minnesota recognized the "reverse pierce" of the corporate veil in *Roepke v. Western National Mutual Insurance Co.*, 302 N.W.2d 350, 352 (Minn. 1981) (court allowed sole shareholder to "pierce" corporate veil from inside-out to allow stacking of no-fault insurance coverages under policies).

[13]The first amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

U.S. Const. amend I. The establishment and free exercise clauses apply to the states as a result of incorporation into the fourteenth amendment due process clause. *School District of Abington School District v. Schempp*, 374 U.S. 203 (1963).

Article 1, § 16 of the Minnesota Constitution is entitled "Freedom of Conscience; No Preference to be Given to any Religious Establishment or Mode of Worship" and provides:

Because the State of Minnesota is neither attempting to regulate religious beliefs or to single out any particular religious belief for adverse treatment, the Minnesota Human Rights Act is a facially-neutral regulation. *See Wisconsin v. Yoder,* 406 U.S. 205, 220 (1972).

But that does not resolve the issue. When an individual's action, exercised under first amendment guarantees, violates a facially neutral regulation such as the Minnesota Human Rights Act, the courts follow a three step analysis to determine whether a constitutional exemption is required. Using that analysis, we first must determine whether the requirements of the Human Rights Act actually impose a burden upon Sports and Health's free exercise of religion. *See United States v. Lee,* 455 U.S. 252, 257 (1982). Second, if such a burden is found to exist, it must be determined whether the burden is justified by a compelling government interest. *Bob Jones University v. United States,* 103 S.Ct. 2017, 2035 (1983). Third, the court must determine whether the questioned regulation is the least restrictive means to achieve the state's goals. *Thomas v. Review Board of Indiana Employment Security,* 450 U.S. 707, 718 (1981).[14] Accordingly, while the

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The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship; or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or to justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

[14]In *United States v. Lee,* 455 U.S. 252, 257-59 (1982), the United States Supreme Court formulated a slightly different three-part test. There, the first inquiry was whether the obligation imposed interferred with

freedom to exercise religious beliefs is an absolute constitutional right, an individual's right to practice his or her religion, in certain circumstances, may be subject to reasonable governmental regulations if the government has an overriding compelling interest. *See Cantwell v. Connecticut*, 310 U.S. 296, 303-4 (1940).

Here, the Commissioner concedes, and the record amply supports, that the employment actions taken by Sports and Health, through its sole owners, was the result of deeply held and sincere religious beliefs. Moreover, the Commissioner concedes that the Minnesota Human Rights Act abridges those beliefs. The Commissioner however, contends that the abridgment is justified by the state's compelling interest in eliminating all forms of discrimination.[15]

The state's contention is buttressed by a number of recent decisions of the federal courts. *See Bob Jones University*, 103 S.Ct. at 2034-35 (fundamental overriding governmental interest in eradicating race discrimination can outweigh a person's right to exercise religious beliefs); *Roberts v. United States Jaycees*, 104 S.Ct. 3244, 3253 (1984) (state's compelling interest in eliminating discrim-

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the free exercise right. The second question was whether the state justified the limitation on religious liberty by showing that it was essential to an overriding governmental interest. The final question was whether accommodating the religious belief would unduly interfere with fulfillment of this governmental interest. The test applied in *Lee* does not substantially differ from the test set out in this text. Moreover, the Supreme Court returned to the test stated in the text in the *Bob Jones University* case.

[15]In her brief the Commissioner asserts the state's interest is in securing for the state's citizens freedom from bigotry in employment whether bigotry is motivated by race, sex or, as in the present case, religion." It is questionable whether the characterization of appellants' actions as "bigotry" is appropriate. *See Websters Third International Dictionary* (unabridged). In each instance, appellants relied on commands found in the New Testament of the Bible, which, if not followed, they claim, would condemn them to perdition.

ination against women justifies the impact that the Human Rights Act may have on male members' associational freedoms); *Dayton Christian Schools v. Ohio Civil Rights Commission*, 578 F.Supp. 1004, 1034-35 (S.D. Ohio 1984) (intrusion on school's free exercise rights by investigation and potential administrative hearing justified by state's compelling interest in eradication of sex discrimination and employment); *Grosz v. Miami Beach*, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 105 S.Ct. 108 (1984) (city's interest in compliance with zoning ordinance sufficiently compelling to outweigh constitutional right to free exercise of religion). *See also United States v. Lee*, 455 U.S. 252 (1982); *Equal Employment Opportunity Commission v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982). In each case the court balanced asserted constitutional rights against the governmental interest in seeking enhancement of civil rights of its citizens. This balancing most recently occurred in *Hishon v. King and Spaulding*, 104 S.Ct. 2229 (1984). In *Hishon* a law associate sued her former employer alleging that sex-biased discrimination caused the decision denying her elevation to partnership status in a law firm. In holding that Hishon's complaint stated a claim cognizable under Title VII, the court rejected the law firm's defense that application of Title VII would infringe upon the firm's constitutional first amendment rights of expression and association. In doing so the majority stated:

> Moreover, as we have held in another context, "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never

> been accorded affirmative constitutional protections." There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union.

*Id.* at 2235 (citations omitted). Justice Powell, in concurrence, emphasized that laws banning discrimination may well infringe upon first amendment rights:

> The Court's opinion properly reminds us that "invidious private discrimination * * * has never been afforded affirmative constitutional protections." *This is not to say, however, that enforcement of laws that ban discrimination will always be without cost to other values, including constitutional rights.* Such laws may impede the exercise of personal judgment in choosing one's associates or colleagues.

*Id.* at 2236, n.4 (Powell, J., concurring) (citations omitted and emphasis added). An examination of the foregoing cases clearly demonstrates that the government has an overriding compelling interest in prohibiting discrimination in employment and public accommodations. Each of the cited cases supports our balancing analysis. The rationale of those cases clearly undermines the claim that Sports and Health can hire and promote only "born again" Christians in management positions. See also, *Roberts v United States Jaycees,* 104 S.Ct. 3244 (1984). In a pluralistic and democratic society, government has a responsibility to insure that all its citizens have equal opportunity for employment, promotion, and job retention without having to overcome the artificial and largely irrelevant barriers occurring from gender, status, or beliefs to the

main decision of competence to perform the work. Likewise, the government has a responsibility to afford its citizens equal access to all accommodations open to the general public.

But are there "less restrictive" means available to achieve this overriding governmental interest? The Commissioner asserts that this compelling state interest can only be advanced by enjoining Sports and Health and its sole owners from continuing the discriminatory practices. A less restrictive alternative might be to grant persons who deeply and sincerely hold sincere religious beliefs an exemption from the statutes, and, in essence, that is what appellants argue. At the outset we note that the Minnesota Human Rights Act does contain exemptions, and, in particular, an exemption for religious corporations when religious beliefs shall be a bona fide occupational qualification for employment. Minn. Stat. § 363.02, subd. 1(2) (1984). Sports and Health, however, is not a religious corporation—it is a Minnesota business corporation engaged in business for profit. By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs. The state's overriding compelling interest of eliminating discrimination based upon sex, race, marital status, or religion could be substantially frustrated if employers, professing as deep and sincere religious beliefs as those held by appellants, could discriminate against the protected classes. Other employers in the state engaged in secular business activities would be bound by the law, but those professing such convictions would not. We agree with the Commissioner that the state's overriding interest permits of no exemption to appellants in this case. Notwithstanding

the fact that the Minnesota Human Rights Act as applied here infringes upon sincerely held religious beliefs and imposes upon the free exercise thereof, when appellants entered into the economic arena and began trafficking in the market place, they have subjected themselves to the standards the legislature has prescribed not only for the benefit of prospective and existing employees, but also for the benefit of the citizens of the state as a whole in an effort to eliminate pernicious discrimination."[16]

(4) In her appeal the Commissioner contends the hearing examiner erred in dismissing Owens, Crevier, and Larson, the sole owners of Sports and Health, from the action. Originally, these three were named parties to this action on the theory that they aided and abetted Sports and Health in engaging in the discriminatory practices. *See e.g.* Minn. Stat. § 363.03, subd. 6 (1984). Although the hearing examiner did give as one reason for the dismissal what might be called a "good faith" exception based upon the sincerity of the beliefs of these three individuals, a ruling which is questionable, he also based the dismissal on the ground that the Commissioner had proved that the three individuals were, in fact, the corporation. He then pierced the "corporate veil," to hold them liable for the illegal actions of Sports and Health. Having done that, he held it was inappropriate to hold those

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[16]Were we to follow the dissent's conclusion, those "less Biblical minded" than the owner of Sports and Health, if they could demonstrate their beliefs were sincere and based on accepted theological concepts, would be permitted to discriminate contrary to the state's public policy of affording equality of opportunity and equal acess to public accommadation to all its citizens. To permit such an exception would substantially emasculate the state's public policy of ensuring civil rights for the citizens. Were we to accept Sports and Health's position, we might justly be accused of significantly encouraging private discrimination. *Cf., Reitman v. Mulkey*, 387 U.S. 369, 376 (1967).

individuals separately liable under the aiding and abetting subdivision of the Human Rights Act for actions which the corporation and they had already been held liable. By his act of piercing the "corporate veil" the legal basis for an aiding and abetting claim is nonexistent. *Cf. State v. Strimling*, 265 N.W.2d 423, 430 (Minn. 1978). With that conclusion, we agree.

(5) The Commissioner sought class certification for all persons who had applied for employment with one of the clubs run by Sports and Health and who were required to furnish information regarding sex, marital status and religion. The hearing examiner refused to certify the class on the ground "it would be unduly burdensome and unfair to [Sports and Health and Owens, Crevier, and Larson] to include in the class any [such] persons * * * who cannot further prove that they were not hired because of one of those reasons." The Commissioner argues that insertion of a "fairness" consideration into the text for class certification under the Human Rights Act is an error of law.[17]

The appropriate test for class certification under the Human Rights Act is contained in Minn. Rule 5000.1100 (1983) (formerly Hum. Rts. Rule 107(e)). That rule, substantially like Minn. R. Civ. P. 23.01, provides that class certification is proper when there are questions of law or fact common to the class, there exists sufficient similarity of claims among class members, there is adequate representation of the class, and the respondent acted on grounds generally applicable to the class making injunctive relief

[17]In reviewing issues of law, the reviewing court is not bound by the decision of the agency and need not defer to the agency's expertise. *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 320 (Minn. 1977).

appropriate. The hearing examiner ruled that the state established these criteria relative to all classes for which certification was sought. Therefore, a class of persons required to furnish prohibited information must be certified.

Rule 5000.1100 provides the hearing examiner no room for exercising discretion. Moreover, it is not in the province of the hearing examiner's power to determine what claims cannot be proven further. Had the examiner pinned his refusal to certify the class required to furnish information on one of the factors found in Minn. Rule 5000.1100, we might be faced with a different question. We conclude, on remand, the requested class should be certified.

We deny the Commissioner's motion to dismiss the appeal of Sports and Health. We deny Sports and Health's motion to dismiss the Commissioner's appeal. We affirm the hearing examiner's rulings that the alleged violations were proved by substantial evidence. We conclude that the Human Rights Act is not facially unconstitutional and that the state's overriding compelling interest in prohibiting discrimination in employment, while it does infringe upon the appellant's exercise of religious beliefs, is constitutionally permissible. We reverse the hearing examiner's order refusing to certify the class and remand for further certification proceedings consistent with this opinion.

COYNE, J., took no part in the consideration or decision of this case.

PETERSON, Justice (dissenting).

The issues presented in this case are of as profound importance as any raised in my 18 years on this court, issues of important constitutional principle. Early in 1967,

during my first term, a "fundamentalist" Christian activist, Gerda Koch, publisher of *Facts for Action*, made defamatory statements concerning the late Professor Arnold Rose; but, sensitive to the first amendment right of free speech and press, I wrote for a unanimous court to reverse a judgment for Rose. *Rose v. Koch*, 278 Minn. 235, 154 N.W.2d 409 (1967). Today, another "fundamentalist" Christian, Arthur Owens,[1] has been found guilty of violating various provisions of the Minnesota Human Rights Act, Minn. Stat. ch. 363 (1984), arising out of his determination to operate his business, Sports and Health Club, Inc., according to what he understands to be commandments declared in the Old and New Testaments constituting the Christian Bible. Being no less sensitive to the constitutional guarantees of religious freedom and free speech embedded in Minn Const. art. 1, §§ 3 and 16, I would reverse the conclusions of law and orders of the departmental hearing examiner and dismiss these actions.

## I.

*Owens' Religious Belief and Practice in a Secular Society*

This case is unique, as the hearing examiner (hereafter examiner) observed, because a statute designed to protect the religious from discrimination has been invoked by the nonreligious or merely nominally religious against Owens, a man of strong religious belief and commitment. The im-

[1]The formal party against whom complaint was made is Sports and Health Club, Inc., doing business at seven locations in the Minneapolis-St. Paul metropolitan area. Its officers are Arthur Owens, president and chief executive officer, and Marc Crevier and Forest Larson, vice presidents. Owens, whose religious and business philosophy is fully shared by the vice presidents, is the founder and dominant figure of the corporation. For convenience only, therefore, with isolated exceptions, references will be to Owens rather than to the vice presidents or the corporate name.

portant issues in this case cannot be fully understood without understanding Owens himself.

Owens is, by his personal confession, a Christian. A "Christian," of course, is one who professes belief in the religion of Christianity. The centuries-old Apostles' Creed, a statement of the main Christian beliefs in use as early as A.D. 150 and still in use throughout Christendom by both Roman Catholics and Protestants, recites:

> I believe in God the Father Almighty, Maker of heaven and earth; And in Jesus Christ his only Son our Lord; who was conceived by the Holy Ghost, born of the Virgin Mary, suffered under Pontius Pilate, was crucified, dead, and buried; He descended into hell: the third day He rose again from the dead; He ascended into heaven, and sitteth on the right hand of God the Father Almighty; from thence He shall come to judge the quick and the dead. I believe in the Holy Ghost; the holy catholic Church; the communion of saints; the forgiveness of sins, the resurrection of the body; and the life everlasting. Amen.

The Nicene Creed, similar in its Christology and adopted in A.D. 325, is used by the Eastern Orthodox Churches.[2]

Justice William Brennan has taken judicial notice of the "characteristically Christian belief" that a Divine Saviour was brought into the world and that the purpose of His miraculous birth was to illuminate a path toward salvation and redemption, "an exclusive, precious and holy [path]."[3] If these are basic beliefs of Christians, they are obviously fundamental.

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[2]*See Apostles Creed* and *Nicene Councils* in The World Book Encyclopedia, Notes by the late Archbishop Fulton J. Sheen. -

[3]*Lynch v. Donnelly*, 104 S. Ct. 1355, 1377 (1984).

Owens described his basic Christian belief in more particularized terms: "born again," "evangelical," and "fundamentalist." They are terms that, for many, have created a stereotype to which negative reactions range from amusement or bemusement to outright hostility[4]—a climate in which the fundamental issues in this case were not, and are not likely to be, given appropriate consideration.

The words "born again" came from the lips of Jesus Christ to Nicodemus as reported in the Gospel according to John.[5] Then, as now, those words signified a conversion—a conscious change in belief or, according to *Webster's Third New International Dictionary* (1961) (hereafter Webster's Dictionary), a "spiritual regeneration." The words "born again" and the possibly more comfortable word "renaissance" derive from the same French word, "renaitre," *id.*, and both are substantially synonymous with an entire "nation under God [having] a new birth of freedom," as Lincoln spoke the words at Gettysburg.

The most dramatic and radical "born again" experience recorded in the New Testament is probably that of St

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[4]The special assistant attorney general exemplified this last reaction when she harshly dismissed Owens' faith in practice as an example of "extreme bigotry," which may explain the unusual vigor with which the complaints have been prosecuted.

[5]*John* 3:1-6 reads:

> There was a man named Nicodemus, a leader of the Jews, who belonged to the party of the Pharisees. One night he came to Jesus and said to him: "We know, Rabbi, that you are a teacher sent by God. No one could do the mighty works you are doing unless God were with him." Jesus answered, "I tell you the truth: no one can see the Kingdom of God unless he is born again." "How can a grown man be born again?" Nicodemus asked. "He certainly cannot enter his mother's womb and be born a second time!" "I tell you the truth," replied Jesus, "that no one can enter the Kingdom of God unless he is born of water and the Spirit. Flesh gives birth to flesh, and Spirit gives birth to spirit."
>
> All New Testament Scriptural quotations are from the Good News for Modern Man version, received in evidence as a joint exhibit.

Paul who, en route to Damascus to persecute early Christians, had a Divine encounter and was converted into the greatest of Christian missionaries. Acts 9:1-30; 22:3-16. No less radical, if less dramatic, was the earlier experience of Peter (together with Andrew, James, and John), who abandoned his fishing nets to follow the Stranger who said, "Come with me and I will teach you to catch men." *Matthew* 4:18-22. Norman Vincent Peale, in an October 3, 1984, dialogue on CBS television, said that he had been born again in a "traditional way" but that not everyone does or must experience it in the same way as he had. Owens, who testified concerning his own born again experience in 1957, described what it meant to him:

> It means that really the experience with Jesus Christ which is a personal relationship with a risen Lord, controls my life, my attitude, the way I operate in my home, the way I operate in interpersonal relationships and the way I operate in business.

Owens is an "evangelical" Christian. "Evangel," according to *Webster's Dictionary*, refers to "glad tidings" or "the Christian gospel." The verb, "evangelize," is defined as "to instruct in the Gospel; to * * * convert to Christianity." A final command of Jesus to his eleven disciples was "[g]o, then, to all peoples everywhere and make them my disciples." *Matthew* 28:19. They did, and changed the world; Owens did, and changed his business.

Owens, finally, is a "fundamentalist" Christian. The words of the Founder of Christianity can be nothing less than fundamental. But to Owens and other "fundamentalists," to be a fundamentalist Christian encompasses a belief that both the Old and the New Testaments, in their

original texts, are *verbally* inspired of God (citing *Matthew* 5:17-18, 2 *Timothy* 3:16-17, and 2 *Peter* 1:21 and 3:16) and accordingly are inerrant and the complete and supreme authority in faith and life.

It is not for an administrative agency or this court to assess the legitimacy of Owens' belief or undertake an exegesis of the Scripture passages upon which it is based. It is enough to acknowledge that it is Owens' belief and one shared by hundreds of thousands of similar believers.[6] Our duty is to recognize that belief and at least respect his right to it. The freedom of belief in matters religious, whether or not the belief is shared by others, is constitutional fundamentalism; however, acknowledging the freedom to believe but denying a concomitant freedom to communicate and put beliefs into practice is essentially oxymoronic.

*The Outreach of Owens' Faith in the Marketplace*

This is a general statement of how Owens applied his religious convictions to the operation of his business. The particularized findings of fact and conclusions of law of the examiner, which raise more than constitutional issues, will be discussed further in Part III.

Following his religious conversion, as well as two periods of imminent bankruptcy, Owens resolved to conduct his business as an evangelical, fundamentalist "discipleship." This was augmented by improved secular business practices not inconsistent with that discipleship. The business prospered, and Owens attributed the "turn-around as being the result of God's working in the management of [his] business."

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[6]The 1985 Statistical Abstract of the United States reports latest census data as showing that religious membership totals 139.6 million Americans. See *infra* note 18 for a survey showing actual church attendance in the United States and Minnesota.

Both club members and employees were made aware of this business posture. A 14-foot-wide sign, with an unrecorded Scriptural quotation, hangs in the main office. Evangelistic Christian placards, pamphlets, magazines, and books—some free and others for sale—are placed in the lounges and other public areas of the several clubs. Bible study classes during the afternoon shift change are made available to all employees; one study leader was identified as a woman managerial employee of Roman Catholic faith, and other managerial leaders, including Owens and Crevier, apparently are Protestants. A chapter of Toastmasters International was established, and sales personnel are required to attend; as required by the charter of the International organization, all sessions start with prayer, and members deliver speeches of their own choosing, frequently on subjects religious in nature.[7] Exclamations of joy—like "Hallelujah" or "Praise the Lord" (*see Psalm* 148)—by employees are not uncommon. This working environment—indisputably a matter of lawful business judgment—was explained to applicants for employment. One purpose of this explanation was to determine whether the prospective employee would be "antagonistic" or offended by such working conditions.[8]

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[7]Similar motivational-public speaking courses, sans opening prayer, are sponsored by the Dale Carnegie Institute. Lee Iacocca, formerly managerial giant of Ford Motor Company and now of Chrysler Corporation, writes in his best-selling autobiography: "Management is nothing more than motivating other people," and "I've sent dozens of introverted guys to Dale Carnegie [Institute courses] at the company's expense. For most of them it made a real difference." L. Iacocca, *Iacocca: An Autobiography* 53-54 (1984).

[8]The following testimony of Nessa Moldo is illustrative:

> Q. Did [Owens], during the course of [your] employment interview, make you aware of his religious beliefs, the fact that he was a Christian man and was running his business according to the Christian principles?

Owens—or sometimes one of the vice presidents if managerial employees were not involved—undertook, in addition, to learn if an applicant had a "teachable spirit" and a "disciplined lifestyle," somewhat interchangeable attitudinal terms. "Discipline" and "disciple," according to *Webster's Dictionary,* have a common connection to the word "teachable." These objectives involved inquiry into family and marital status, for two reasons: first, if it revealed an immoral relationship, Owens was not willing to subsidize it with employment; second, if the applicant came from a disciplined home environment, it revealed a favorable likelihood that the applicant had learned submission to authority, acceptance of a task to be done, and capacity to complete that task.[9] Owens considered that employees who resisted authority and instruction demonstrated, in Owens' words, a "lack of *enthusiasm*. They're not able to do, and they don't want to do, these task things to reach the goals that we have set for them."[10] (emphasis supplied).

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A. Yes.
* * * *
Q. Did he ask you whether that would be a problem with you?
A. Yes.
Q. What did you answer?
A. I said I had no problem with that. And then [I] asked him if he would have a problem with my being Jewish and working for him.
Q. And what did he say?
A. No. No problem.
* * * *
Q. So you came to work?
A. Right.

[9]Owens thought a person from a Catholic farm family was, on this basis, a most promising prospect.

[10]"Enthusiasm" is defined by *Webster's Dictionary* in its archaic form as "inspiration" by a god or other superhuman power" or, in modern usage, as "strong excitement of feeling on behalf of a cause or subject." Many years ago Frederick Williamson, then president of New York Central Railroad, told Dale Carnegie: "The longer I live the more certain I am that enthusiasm is the little-recognized secret of success. * * * [I]f two men are nearly equally matched, the man who is enthusi-

Owens believes, not surprisingly, that a person's religion—if any—"permeates, motivates, and directs every thought and action of that person's life," private and public.

It is undisputed that no person will be initially employed in or subsequently promoted to a *managerial* position unless he or she is a "born again" and "growing" Christian. Unlike non-managerial employees, attendance at Bible study sessions is mandatory. Owens' Scriptural basis for this standard is in St. Paul's words of counsel to members of the church in Corinth:

> Do not try to work together as equals with unbelievers, for it cannot be done. How can right and wrong be partners? How can light and darkness live together? How can Christ and the Devil agree? What does a believer have in common with an unbeliever?

2 *Corinthians* 6:14-15.

The religion-related standards for managerial employees are the most pronounced and conspicuous of those found by the examiner as violative of the anti-discrimination statute. Common sense and common law, however, should make them the least subject to sanction. All employees, to a lesser or greater extent, have a fiduciary relationship to their employers, *Restatement (Second) Agency* §§ 1, 2, 13 (1957), with a duty to act in the interests of the employer and not as an adversary. This principle has been greatly diminished in the decades following the enactment of modern labor relations laws, but it is most significant that those statutes uniformly exempt managerial employees

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astic will find the scales tipped in his favor. And a man of second-rate ability *with enthusiasm* will often outstrip one of first-rate ability *without enthusiasm*." (emphasis in original); *The Dale Carnegie Course* 66-67 (Dale Carnegie Publishers, Inc. 1955).

from adversarial collective bargaining relationships. The federal Labor-Management Relations Act, 29 U.S.C. § 152 (1976), in its definition of "employee," expressly excludes "any individual employed as a supervisor." Although the statute makes no mention of "managerial employee," it is construed, *a fortiori,* to exclude them as well. *See N.L.R.B. v. Bell Aerospace Co.,* 416 U.S. 267 (1974). As stated in *N.L.R.B. v. Yeshiva University,* 444 U.S. 672, 682 (1980), both exemptions grow out of the same concern: that an employer is entitled to the undivided loyalty of its representatives. The Minnesota Labor Relations Act does not contain a specific definition, but in Minn. Stat. 179.16, subd. 2 (1984), provides that "[s]upervisory employees shall not be considered in the selection of a bargaining agent." Paul W. Goldberg, the present director of the Minnesota Bureau of Mediation Services, and his predecessor, Peter E. Obermeyer, confirm that units of managerial employees have never been certified for collective bargaining purposes with a private employer in Minnesota. The common sense of these statutes, and common sense without statutes, is that no business person would wish or should be required to be associated at the critical managerial level with a person who rejects the basic operational objectives and philosophy of the business enterprise.

The point just stated can be illustrated by the hypothetical example of two not-so-hypothetical business corporations that sell books and other publications but that have radically different business philosophies. Corporation A operates stores selling predominantly religious publications, openly displayed in sections bearing such descriptive signs as "Bible Commentaries," "Bible Stories for Children," and "Theology"; corporation B operates stores

selling only secular books and magazines, including a large number of so-called "adult" books and magazines. I pose what are to me self-answering negative answers to these questions: Should corporation B be required to employ an Evangelical Christian as a *clerk* who would find that working environment offensive? Should corporation A be required to hire an atheist who would find its working environment at least uncomfortable and who very probably would be reluctant to read any such books for the purpose of discussing and answering inquiries from interested customers? It is absolutely unthinkable that corporation B should be required to employ a branch or general *manager* who would be in a position actually to discourage the sale of materials he or she thought pornographic, just as corporation A should not be required to employ in a managerial position one who would convey his or her disinterest or disdain to the customers. This being so, it makes absolutely no sense to forbid the asking of a religion-related question that would disclose these basic incompatibilities, unless the even more absurd answer were to be that the person should be hired first, without such inquiry, and only later discharged for nonperformance of the duties of loyalty and performance owed the employer at either place of business.

*The Propriety of Religious Discipleship in a Secular Society*

The examiner's disposition of the basic issue in this case was as sweeping as it was superficial: Owens' religious beliefs are sincere but, when put into practice in a commercial service business, simply irrelevant.[11] To say, as the examiner

[11]The attorney general's declaration that "extreme bigotry" and "extreme intolerance" are the essence of this case is not only irrational, but cynical. "Bigotry" is defined by *Webster's Dictionary* as "obstinate and

said, that "[t]he essence of the employer's business is not a 'discipleship for Christ' * * * but rather the operation of an exercise emporium" is impermissibly to substitute the examiner's business judgment for Owens' business judgment. The examiner, at the same time, decrees a dichotomy between Owens' beliefs and practices, divorces the sacred from the secular, does not distinguish praying on one's knees on Sunday from preying on other persons in the marketplace on Monday, and perceives no significant difference between the commitment of conviction and the detachment of a possibly more casual Sabbath ceremony or community convention.

The examiner's view seems to reflect what Harold J. Berman, James Barr Ames, Professor of Law, Harvard University, calls "[t]he fundamental changes that have taken place in our legal institutions during the past two generations [as] part of a transformation of the entire Western legal tradition, marked particularly by its disconnection from the religious foundations upon which it was built." He concludes:

> [A]s a matter of historical fact the legal systems of all the nations that are heirs to the Western legal tradition have been rooted in certain beliefs or postulates: that is, the legal systems themselves have presupposed the validity of those beliefs. Today those beliefs are postulates—such as the structural integrarity of law, its continuity, its religious roots, its transcendent qualities--[which] are rapidly disap-

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unreasoning attachment to one's own belief * * * with intolerance of beliefs opposed to them." If Owen's Christian conviction is "bigotry," the same may be said of Orthodox Jews, Muslims, Hindus, and others who believe theirs is the true religion. Still worse, it comes close to defaming Jesus for saying, "I am the way, I am the truth, I am the life; no one goes to the Father except by me." *John* 14:6.

> pearing not only from the minds of philosophers, not only from the minds of lawmakers, judges, lawyers, law teachers, and other members of the legal profession, but from the consciousness of the vast majority of citizens, the people as a whole; and more than that, they are disappearing from the law itself. The law is becoming more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity.[12]

Contemporary theologians of national scholarly stature address more cogently the premise advanced in this Part I, preliminary to reaching the fundamental constitutional issue in all these cases.

Martin E. Marty, Ph.D.,[13] wrote in *U.S. News & World Report*:

> We tend to underestimate the power of religion in people's lives, because for many years in America religion had become a private affair. * * * I do not believe in turning schools into churches, but our children would be well served by courses teaching about the role of religion in human life. Schools should teach reality, and media should cover reality; yet we've largely screened out the reality of religion in society. A youngster can watch 15 years of children's TV and learn about the mailperson and

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[12] *Religious Foundations of Law in the West: An Historical Perspective*, 1 Journal of Law and Religion 3, 3, 41-42 (Summer 1983).

[13] Dr. Marty is an ordained Lutheran clergyman and a professor of Modern Church History, University of Chicago. He is publisher of *Context*, a commentary on religion and culture, and associate editor of *Christian Century* magazine. *See also infra* note 18 and accompanying text.

> the grocer but never see a rabbi, monk or minister. * * * The group I would regard as the next frontier for religion is that huge class of young adults—the high-rise, high-tech people—who devote tremendous energies to their careers and take the pressure off through a kind of hedonism. There are religious stirrings among them, yet few of them are attracted to established churches. This group and millions of other Americans are likely to pursue religion entirely privately, which can be a fine expression of personal freedom but a problem when it comes to reaching people and reforming society.

U.S. News & World Report 46 (Sept. 24, 1984).

Peter J. Gomes, Ph.D.,[14] writing in the Minneapolis Star and Tribune, Oct. 12, 1984 (Commentary) at 19A, wrote:

> In what we like to describe as our secular and pluralistic republic, our problem is with those who now appear unwilling to leave well enough alone in the business of religion. The "problem" with religion, of course, is the religious, those who take it seriously, those who are unwilling to be among Swift's "Anythingarians." They know what Edmund Burke meant when he wrote, "Nothing is so fatal to religion as indifference, which is, at least, half infidelity." To such as these, a general religion is no religion at all.

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[14]Dr. Gomes is an ordained clergyman in the American Baptist Church. He is Plummer Professor of Christian Morals, Harvard University, and Minister of Harvard's Memorial Church. Time Magazine, Dec. 31, 1979, at 67, listed him among its selection of the seven greatest preachers in the United States.

James Hitchcock, Ph.D.,[15] in an October 1984 address at Hillsdale College, reported in its February 1985 issue of *Imprimis,* said:

> In recent years there has been a coming together of Catholics and Evangelicals motivated by a growing recognition of the threats to Christianity itself posed by both the secular culture and by liberal Christianity.
>
> Liberal Christianity can be defined as the assumption that religion is under an obligation to adapt itself completely to changing cultures. Ultimately, it does not believe in transcendent divine revelation but conceives religion as born of the on-going "religious consciousness" of the human race. Virtually everything in religion, including finally even God, is regarded as a human creation, which human beings therefore can, and even must, change in order to meet changing human needs. By contrast, orthodox Christians believe that the source of their religion is God's self-revelation of Himself to His people.
>
> It is at this point * * * that the widest gulf exists in contemporary Christianity. It is not a gulf which runs between denominations, but cuts across practically all denominations, running through the middle of many.

Richard John Neuhaus,[16] interviewed in the *National Catholic Register (reprinted in* The Presbyterian Layman

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[15]Dr. Hitchcock is Professor of History, St. Louis University, A Jesuit school. He chairs the Catholic League for Religious and Civil Rights. He is past president of the Fellowship of Catholic Scholars and former editor of Communio.

[16]Mr. Neuhaus is a Lutheran clergyman, commentator, and civil rights activist.

10 (Nov./Dec. 1984)), gave this answer to the question, "How can Christians instill Biblical values into a pluralistic society?":

> What we need in this society more than anything else, is exemplary communities of Christian virtue, both private and public. Secondly Christians should be uninhibited in articulating their beliefs in the public arena. The third task, which is terribly important, is to find points of agreement with those who are not motivated by the same biblically based values that motivate us.

Orthodox Judaism, no less than Christianity, has no sterile dichotomy like that imposed by the examiner as dispositive in this case. Milton Steinberg,[17] in his excellent book for non-Jews, *Basic Judaism,* writes:

> Judaism, being more than a church, is broader in its interests than theology and ethic. It is, in fact, no less than a full way of life. Wherefore it seeks to mold not only the beliefs, morals, and worship of the Jew, but his every act, his eating, drinking, work and play. Ritual is the instrument designed to this end, carrying the Jewish religion into every nook and cranny of his being until nothing he does is untouched by Judaism.

M. Steinberg, *Basic Judaism* 136 (1947).

The above-quoted views of professionals occupying prestigious positions in academia and pulpits in the United

[17]Rabbi Steinberg received his Master's Degree in Philosophy from Columbia University and an honorary degree of Doctor of Hebrew Letters from the Jewish Theological Seminary of America. He was Rabbi at the Park Avenue Synagogue in New York until his death in 1950.

States are confirmed by parishioners in the pews of Minnesota churches. The Institute of Ecumenical and Cultural Research, located on the premises of St. John's University, Collegeville, Minnesota, recently undertook a 5-year, $200,000 study "to learn how Christian faith affects the lives of church members in Minnesota, in order to gain information concerning the internal condition of the churches and their relation to society." The nature of the study and its extensive findings were published in a 1983 book entitled *Faith & Ferment: An Interdisciplinary Study of Christian Beliefs and Practices* (hereinafter *Faith & Ferment*), edited by Robert S. Bilheimer, a Presbyterian minister and executive director of the Institute. The study consisted of questionnaires sent to some 2,000 church members and ministers in various denominational churches in demographically representative counties, followed by intensive personal interviews with, among others, several of those who had responded to the questionnaires. The study was an interdisciplinary collaboration, with the design of the inquiry developed by a professional group of anthropologists, sociologists, and psychologists from the University of Minnesota.[18] Sister Joan D. Chittister, O.S.B.,

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[18]To obtain a random sample of active church members, the project employed a two-stage sampling design to determine which members should receive questionnaires. The first stage used the same seven geographical regions employed in the reporting of state vital statistics; for the second stage, two adjacent counties within each region were selected at random to serve as sampling domains for the study. Churches within these counties were then chosen randomly from phone lists in such a way to as to ensure representation from each region proportional to its population. In all, 210 churches were selected and the pastor at each was asked to select 10 members of his or her congregation. When the initial solicitation failed to elicit a sufficient number of replies, an additional solicitation was mailed to 210 alternate churches that had been chosen from the telephone directories in anticipation of such a contingency. These alternate churches were selected from a different set of 14 counties chosen in the manner previously described. *Id.* at 334-35. In addition

Ph.D., the project coordinator and a professional consultant to religious organizations, prepared a unified presentation of the project's major findings, which appears in the first part of *Faith & Ferment*. The next part of *Faith & Ferment* presents a historical and theological analysis of the data by Dr. Martin E. Marty, a co-producer of the project, followed by a third part made up of supplemental essays by lay and clerical members of the commission. Veteran religion reporter Willmar L. Thorkelson, a lay member of the *Faith & Ferment* project, said, " 'Monumental' is the word that journalists would use to describe [it]." *Faith & Ferment* at 273. It is a study that has not been replicated in any of the other states.

The most inportant finding, as reported in *Faith & Ferment:*

> In the minds of these respondents, work and faith are clearly interrelated. More than three-fourths of

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to questionnaires, 101 personal interviews were conducted. A portion of the interviewees were drawn from those who returned questionnaires and others were drawn from those who expressed interest. *Id.* at 12-13.

The survey therefore obviously was not based upon a more exact statistical sampling, as in a Gallup Poll, and the answers of respondents may be skewed by the nature of the questions asked in the in-depth interviews. Nonetheless, designers of the project concluded that "[t]he data presented * * * provide a reliable base upon which to achieve the stated aim of Faith and Ferment (sic): 'to produce hypotheses of weight concerning the dimensions, the problems and promise of the present situation'." *Id.* at 337.

The Gallup Poll annually surveys church attendance by adults in five selected weeks—asking the question, "Did you, yourself happen to attend church or synagogue in the last seven days?"—using a statistically more valid sample of the adult population within four regions of the United States but without illuminating more than the single fact of attendance. The most recent poll, released December 20, 1984, showed these percentages and attendance: South, 44; Midwest, 42; East, 38; West, 33. The *Faith & Ferment* project concentrated on the attitudes of those who were identified as churchgoers, but added more information concerning the extent of their attendance: "[h]alf of them report that they go [to church] at least once a week * * * [a]lmost half (49%) said that they watch religious programs on TV at least twice a month. These are not people who describe the value of church without going to any." *Id.* at 79.

them (79%) see their work as being in harmony with their Christian faith. Some (13%) say that the work they do for a living has little or nothing to do with their faith. Few (7%) believe that what they do to earn their livelihood conflicts with their faith. But regardless of their answers, most of them see faith as an acceptable and intelligent guide in the marketplace. It directs their conduct in their daily work. Many (81%) try to be an example for Christ while at work. And in a society that urges people to keep a proper distance between their religious convictions and their public activities, faith requires a surprising number (39%) to tell others on the job about Christ. * * * [O]ne thing is all but certain: whatever is going on in the American marketplace is perceived by Christians in Minnesota to be within the purview of faith.[19]

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[19] *Faith & Ferment* at 133-35. There were other specific findings that are relevant to the issues discussed at various points in this opinion, including Part V, among them these:

> [T]he church members who participated in this study claim that family worship at home is a regular and even frequent part of their lives. Over two-thirds (67%) pray at meals "most always." Almost half (48%) say they worship at home as a group every single day by reading Scripture or some spiritual book, with the rosary, or in family night prayer. Twenty-five percent reported that they never pray as a family or, if they do, make it a practice only on holidays. * * * For most Catholics, Evangelical Covenant members, Lutherans, and Baptists in the sample (51%-68%), family worship is reportedly a daily exercise.

*Id.* at 26.

> Almost every respondent (95%) said that the Bible is in some authoritative sense the Word of God and that this is a necessary belief for all Christians. It was not surprising, then, to find that a large portion of the Christian community (77%) felt strongly that reading the Bible is important for the development of their spiritual lives. Almost all respondents (92%) credited the reading of the Bible as having at least some importance for their spirituality. Even 59% of the Roman Catholics, for whom Bible Study has not been the

## II.

### *The Statutory and Constitutional Focus of the Human Rights Act*

Minn. Stat. § 363.03 (1984)—subject to a prefatory exception for bona fide occupational qualifications—contains a statutory subdivision declaring the following employment practices of an employer to be unlawful and prohibited discriminatory acts: requiring an applicant for employment to furnish information that "pertains" to religion, sex, or marital status (subdivision 1(4) (a)); refusing to hire an applicant for employment or maintaining a system of employment which "unreasonably" excludes a person seeking employment because of religion, sex, or marital status (subdivision 1(2) (a)); and discharging an employee or discriminating against an employee with respect to upgrading of position because of religion, sex, or marital status (subdivision 1(2) (c)). Minn. Stat. § 363.03, subd. 3, additionally prohibits denying full and equal

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focus of spiritual formation, were convinced that the Bible is essential to their personal spiritual development.

* * * *

Forty-one percent of the respondents surveyed believe that in the Bible "people report verbally what God said and that the Bible in the original text contained no errors."

* * * *

In general, then, these Christians believe that God is present in time and that their lives are marked and managed by a divine love and will, that prayer and Scripture link the mind of God and the matter of life, and that the Christian message is determinative for the salvation of the world. * * *

Consequently, perhaps, their sense of personal accountability is high.

*Id.* at 66-77. Jerome P. Theisen, O.S.B., S.T.D., Abbot of St. John's Abbey, Collegeville, Minnesota, echoed similar observations by others of the members: "What is particularly striking in the data is the high incidence of the practice of prayer and the remembrance of God. * * * God is active in the very midst of work and leisure, love and anxiety, decisions and problems. * * * One fact is clear: the Christians of Minnesota want and expect to be involved in matters that extend beyond the walls of the church building." *Id.* at 296-99.

enjoyment of the facilities of a place of public accommodation because of religion or sex, and a violation of this subdivision is declared to be a misdemeanor. Minn. Stat. § 363.101 (1984) .The test of these provisions, in relevant part, is set forth in the margin.[20]

The Minnesota Constitution deals in direct terms with the validity of the Human Rights Act, both in its text and as applied in this case. Declaring in its Preamble that it was ordained and established in gratitude to God for our civil and religious liberty and to secure its blessings for posterity, it guarantees in article 1, section 16, every person's freedom from "control of or interference with the rights of conscience." By article 1, section 3, it guarantees

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[20]The Minnesota Human Rights Act, by the following clauses of Minn. Stat. § 363.03, subd. 1 (1984), forbids the following:

Except when based upon a bona fide occupational qualification, it is an unfair employment practice:

* * * *

(2) For an employer, because of race, color, creed, *religion*, national origin, *sex*, *marital status*, * * * disability, or age,

(a) to refuse to hire or to maintain a system of employment which *unreasonably* excludes a person seeking employment; or

(b) to discharge an employee; or

(c) to discriminate against an employee with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

* * * *

(4) For an employer * * * before a person is employed by an employer * * * to

(a) require the person to furnish information that pertains to race, color, creed, *religion*, national origin, *sex*, *marital status* * * *

Minn. Stat. § 363.03, subd. 3 (1984), prohibits the following:

It is an unfair discriminatory practice:

To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a public accommodation because of race, color, creed, religion, disability, national origin or sex. * * *

Minn. Stat. § 363.101 (1984) provides:

In addition to all other remedies provided under this chapter, every person who commits an unfair discriminatory act as set forth in section 363.03, subdivision 3, or aids, abets, incites, compels, or coerces another to do so, shall be guilty of a misdemeanor.

(emphasis supplied).

the right of all persons to freely speak their sentiments on all subjects. The full text of these two sections of the Minnesota Bill of Rights is set out in the margin.[21]

*The three-part factors of Constitutional analysis*

The state acknowledges that a three-step analysis should be undertaken when a statute is challenged as infringing upon these fundamental interests, namely: (1) whether the statute imposes a burden upon the free exercise of those rights; (2) if so, whether the imposition of that burden is justified by a compelling and overriding government interest; and (3) even so, whether the challenged statutory proscriptions are the least restrictive means to achieve the state's objectives.

The function of the examiner was a schitzoid one, which accounts for the unbalanced result in this case. On the one hand, section 363.11 of the Human Rights Act, in its interpretation and application, directs that the provisions of the Act "shall be construed liberally for accomplishment of the purposes thereof," and section 363.12, subd. 1, declares it to be the public policy of this state "to secure

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[21]Minn. Const. art. 1, § 3, provides:

> The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.

Minn. Const. art. 1, § 16, provides:

> The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or eccesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

for persons in this state freedom from discrimination." Responsive to that mandate upon the administrative agency —and without power to determine issues of constitutional law—the examiner, by his findings, conclusions, and orders, interpreted the statute not only in a "liberal" fashion but in a remarkably extravagant way.

On the other hand, the three-factor constitutional analytical framework has the opposite mandate, for its imposes restrictions against intrusion upon fundamental and overriding civil liberties. The examiner acknowledged, as to the first factor, that the sincere religious beliefs of Owens were burdened by the Act, but with respect to the second and third factors, he did no more than make the uncritical declaration that the burden was justified by a compelling state interest, without less restrictive alternatives of interpretation or enforcement.

The statutory and constitutional facts are not in all respects neatly separated, and they tend to coalesce. The greater the magnitude of the individual's liberty interest, the more compelling must be the state's interest sufficient to override the individual's. Similarly, the greater the individual's interest, the greater must be the state's search for less restrictive alternatives of interpretation and enforcement. Among such alternatives, constitutionally-offensive provisions of a statute may effectively be read out of the statute to save the statute or, conversely, safeguarding provisions may be read into the statute to salvage it. As we declared in *State on Behalf of Forslund v. Bronson*, 305 N.W.2d 748, 751 (Minn. 1981):

> It is well established that if a statute is ambiguous, the construction which avoids constitutional conflict is preferred although such construction may be less

> natural. If the act is reasonably susceptible of two different constructions, one of which would render it constitutional and the other unconstitutional, we must adopt the one making it constitutional. Additionally, in the interpretation of statutes, the courts are required to discover and effectuate legislative intent, to consider objects which the legislature seeks to accomplish by the statute and the mischief sought to be remedied, and to avoid the result which would be absurd or would do violence to the language of the statute.

(citations omitted).

A pervasive issue, significant in both a statutory and constitutional sense, is both illustrative of this coalescence and important to all the employment-related complaints of discrimination: are the statutory prohibitions uncompromisingly absolute and are the stated exceptions, particularly the general prefatory exception for "a bona fide occupational qualification," just as uncompromisingly narrow? There are other general and specific exceptions that give negative answers to these really rhetorical questions:

> (a) A rule of reason is incorporated in section 363.03, subd. 1(2) (a), which prohibits a system of employment which "unreasonably" excludes a person seeking employment.
>
> (b) An exception is made by section 363.03, subds. 3 and 4, which require physical accommodations for disabled employees, if, because of size or type of operation of the employer's business or the cost of compliance, the employer would suffer a hardship.

(c) An exemption from the provisions with regard to age is made by section 363.02, subd. 7, for persons in the summer youth employment program.

(d) An exception is made by section 363.02, subd. 1(2), for a "religious *or* fraternal corporation, association, or society with respect to qualifications based on religion, when religion shall be a bona fide occupational qualification for employment."

(emphasis supplied).

The examiner missed the opportunity to apply his sacred-secular dichotomy to the exception for religious and fraternal corporations, neither of which is defined in the Act. Consulting *Webster's Dictionary,* he narrowly defined "religious corporations, associations or societies" as only those "whose primary purpose is ecclesiastical, which is defined as 'of or relating to a church, especially as a formal and established institution' or 'of or relating to the formal and established institutions or government of any religion.' "[22] Based on this definition, the examiner dismissed Owens' claim for an exception, stating that the fact that Owens operates the club in a manner based on his religious convictions is incidental to the primary purpose of the business.

The examiner's stated reason for rejecting Owens' claim for a religious corporation exception encounters substantial problems of inconsistency when applied to the statutory

[22]Minnesota Statutes ch. 315 governs the organization of religious corporations. Both the YMCA and the YWCA are, by sections 315.44 and 315.49 (1984), incorporated under this chapter. They do not, however, meet the examiner's definition of a religious corporation, association, or society — but each does, in substantial part, fit his label of "exercise emporium." This indicates, in any event, an expansion of the exception noted in the preceding paragraph of the text.

exception for fraternal corporations, associations, or societies, some of which are church related and others of which are not. Fraternal beneficiary associations are organized under Minn. Stat. ch. 64A (1984). Section 64A.-02 defines such association as:

> Any corporation, society, order, or voluntary association without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, having a representative form of government, and having a lodge system with ritualistic form of work or a branch system that confines its membership to any one religious denomination, and which shall provide for payment of benefits in accordance with this chapter.

But section 64A.03 provides that a ritualistic form of work or ceremony is not required where membership is confined to members of any one religious denomination. The exceptions stated in section 363.02, subd. 1, however, are not confined to the limitations of section 64A.02. A common function of fraternal benefit associations is the providing of life, accident, sickness, and disability insurance for their members (section 64A.48), but they may transform themselves into mutual life insurance companies as well (section 64A.15). They are highly regulated by the insurance commissioner with respect to policy provisions, reserve funds, and other financial matters (sections 64A.-19-43). Section 64A.44 exempts these associations from taxation under the general tax or revenue laws, except as to real estate. Some fraternal benefit associations are religion-related, such as the Catholic Aid Association and Lutheran Brotherhood; others are not, such as the Sons of

Norway, the Degree of Honor Protective Association, and the Woodmen of the World Insurance Society.[23]

The important point concerning the fraternal benefit associations is that they operate in the secular marketplace in competition with other insurance companies, differing only as to the character of the population from which they solicit business. It is true that they are exempt from taxation as charitable institutions, but it is equally true that not all charitable institutions are exempt from the provisions of the Human Rights Act, such as nonprofit charitable hospitals. It is true that some of the fraternal benefit associations provide financial support to churches, church-affiliated schools, and other religious institutions. It is equally true, of course, that many successful businessmen with strong religious commitment, such as Owens, give substantial support to such institutions; indeed, Owens founded and supports Chapel Hill Academy in Deephaven, Minnesota, a strongly religion-oriented elementary secondary school.

Our legislature has, in other legislation, demonstrated sensitivity to the conflict between freedom of religion and the operation of secular statutes where the potential for conflict was readily predictable, as in the case of Sunday closing laws. Unlike such statutes in other states, of which Pennsylvania was one, the Minnesota statute, Minn. Stat. § 325.913(5) (1967), permitted Sunday opening for "a place of business which is regularly closed on Saturday

[23]The information stated in this paragraph, other than references to Minn. Stat. ch. 64A, is taken from a brochure entitled *The Story of Fraternal Benefit Societies in America*, obtained from the Minnesota Insurance Information Center. No information is available as to how circumspect these competitive fraternal benefit associations are in limiting sales of insurance only to persons genuinely qualified by religious or other membership criteria.

and which was actually closed all hours on the Saturday before the Sunday on which such sale of restricted items occurs." This exception, notwithstanding the state's burden of enforcement, was designed to avoid a burden upon those whose faith, like those of the Orthodox Jewish faith, requires the closing of their places of business and total abstention from all manner of work from nightfall each Friday until nightfall each Saturday. Taking note of this in *State v. Target Stores, Inc.*, 279 Minn. 447, 459, 156 N.W.2d 908, 916-17 (1968) (although invalidating the statute on grounds of vagueness, as a denial of due process under the United States and Minnesota Constitutions), we said:

> The statute in this case reflects a legislative attempt to alleviate the indirect religious burden upon Sabbatarians by granting those merchants a restriction-free Sunday if they close on Saturday, while at the same time requiring no religious declaration for the exercise of that right.

Our legislature, unlike the examiner, obviously did not think that religious freedom was irrelevant merely because its exercise only to secular commercial activities. Neither was the legislature saying, as does the majority opinion, that such an exception would "frustrate" the statutory objectives.

It would do no violence to the statute either to impose upon Owens a less restrictive definition of "religious corporation" or simply to extend to his business-discipleship the comparable exception granted by the statute to frater-

nal corporations, associations, and societies.[24] To do so would not, contrary to the majority opinion, "emasculate" the statute, and it is consistent with the legislature's own action in providing several exceptions to application of the statute. Not to do so, on the other hand, raises grave issues of freedom of religion and speech and, to some extent, the denial of equal protection and due process under the Minnesota Constitution. The exceptions for which I argue would be dispositive of the principal issues raised by the complaints against Owens.

III.

*Analysis of Hearing Examiner's Findings of Fact, Conclusion of Law, and Enforcement Orders.*

The findings of fact and conclusions of law, together with cease and desist orders based thereon,[25] on the nine

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[24]The religion-based exception for churches, of course, makes sense. A Jewish synagogue or temple should not be required to employ a Christian or other person who inherently would be indifferent, even if not "antagonistic," to its beliefs and practices. The Catholic Bulletin of the Archdiocese of St. Paul-Minneapolis obviously would not choose to employ a Lutheran as its editor. Trinity Covenant Church should not be required to employ a Unitarian. The incompatible religious identification would be ascertained by direct inquiry. Unlike these religious corporations, and unlike some fraternal benefit associations, Owens notably does not limit employment to persons of any one religious affiliation.

[25]The examiner deferred to later hearing a determination of statutory money damages to be paid to the charging parties. He did issue a cease and desist order in the following terms, prohibiting:

> (a) refusal to hire any person because of that person's religious beliefs or practices;
> (b) refusal to hire any person because that person has stated an objection to the religious beliefs or practices of the Respondents' management or other employees;
> (c) inquiry into the religious beliefs or practices of any prospective employee;
> (d) inquiry into the religious beliefs or practices of any employee;
> (e) taking any adverse action against any employee because of that employee's religious beliefs or practices;

complaints determined adversely to Owens and his associates, Crevier and Larson, may be grouped for discussion into five categories. The fourth and fifth of these categories present issues not directly considered in the prior parts of this opinion, and all of them consider issues of freedom of speech, in addition to the main theme of free exercise of religion. The text of the opinion can only high-

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(f) denial of a supervisory or management position to any person based upon that person's beliefs or practices;
(g) requiring, soliciting or suggesting the participation in Bible studies or other religious exercises or practices on the part of any employee;
(h) taking adverse action against any employee who does not participate in Bible studies or any other religious exercises or practices because of that non-participation;
(i) taking any adverse action against any employee who objects to the religious practices or exercise of management or of any other employees because of their objection(s) thereto; and

(2) Discriminating against any person on the basis of marital status, including:
(a) refusal to hire any person because of marital status;
(b) requiring any prospective employee to furnish information pertaining to marital status;
(c) taking adverse action against any employee because of marital status;
(d) denial of a supervisory or management position to any person based upon that person's marital status; and

(3) Discriminating against any person on the basis of sex, including:
(a) refusal to hire any young, unmarried women who live away from home without their parents' consent because of that lack of consent;
(b) inquiry of any young, unmarried woman as to whether she lives away from home and, if she does, whether she has her parents' consent;
(c) refusal to hire any young, unmarried woman who desires to work and does not have the consent of her parents, because of that lack of consent;
(d) inquiry of any young, unmarried woman as to whether she has her parents' consent to work;
(e) refusal to hire any married woman who desires to work and does not have her husband's consent, because of lack of consent;
(f) inquiry of any married woman as to whether she has her husband's consent to work; and

(4) Denial to any person of the full and equal enjoyment of its services, facilities and privileges as a public accommodation, to wit:
(a) harassment or ridicule of any member, guest or other use of its services and facilities because of religion.

light the examiner's findings. The factual findings of the examiner are set forth verbatim in separate footnotes as to each of the charging parties, but omitting for brevity findings as to dates of prior employment and experience found to qualify them for the positions involved, which are without significance to the issues considered in this opinion. These footnoted findings will make even more self-evident the unwarranted sweep of the cease and desist orders.

1. Finding: requiring the furnishing of information related to religion or marital status.

The finding and conclusion as to Joseph Williams[26] is limited *solely* to this; and a reading of the finding in the footnote reveals its lack of substance. The findings and conclusions as to Robin Ann Carnahan[27] and Beverly Larsen,[28] however, do involve extensive religion-related inter-

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[26]*Joseph Williams*, a champion body builder who worked out at the LaSalle club, approached Crevier about the possibility of employment. Although there was no current opening for an associate membership director, Crevier did discuss with Williams what was involved in the job and that the job description was based on biblical principles. He explained to Williams what the religious beliefs of the Sports and Health Club's management were, specifically including that Williams had to be a reborn Christian in order to be hired and also would have to go to weekly Bible studies. Williams then decided not to fill out an application for employment, although Crevier offered him the opportunity to do so for consideration when an opening occurred in the future.

The examiner found that appellants had violated Minn. Stat. § 363.03, subd. 1(4)(a), by requiring Williams to furnish information pertaining to religion before being employed.

[27]*Robin Ann Carnahan* was employed as an associate membership director at the Normandale club. Prior to being hired by appellants she had two employment interviews, one with Vice President Larson and Vice President Crevier, and the other with Arthur Owens. The first interview consisted of questions regarding experience and background in physical fitness and instruction and as to her attitude toward selling. The interview with Owens related to her religion, her marriage, and her family, namely, whether she was a Christian; if she read the Bible; if she went to church; if she would speak freely about her religion to other people; whether she was married; whether she and her husband prayed together and went to church together; and whether her parents, who were divorced, were still married. Owens perceived a possible antagonistic

rogation concerning Bible reading, prayer practice, and church attendance, together with questions about the divorces of their parents. These findings are then joined with other findings of discrimination in employment opportunity.

Forbidding an employer from asking *any* questions related to religion or morality denies to that employer a

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attitude by her demeanor and reluctance to speak freely during the interview, particularly when she answered questions about her parents and their divorce. Subsequent to her employment, during a series of conferences with associate membership directors at the club to discuss their goals in the organization and their general attitudes, Crevier asked for her opinion of Owens. She expressed her disapproval of religious-oriented employment interviews and of the sale of Bibles in the club's lobby. She also compared the unavailability of health-oriented literature at the club with the great volume of Christian material available for members in the lobby and lounges. Referring to the requirement that all management employees were required to attend Bible studies as part of regular managers' meetings, she asked Crevier if it would be possible for a manager or assistant manager to attend only the business portion of such meetings. Crevier told her that if that was her attitude, he would have to dismiss her. Carnahan was told that it was a requirement that employees in management positions had to go to Bible studies.

The examiner concluded, as a matter of law, that appellants had violated Minn. Stat. § 363.03, subd 1(2)(b), by discharging Carnahan because of religion and also had violated subd. 1(2)(c) by discriminating against Carnahan because of religion with respect to the upgrading of her employment.

[28] *Beverly Larsen* was employed at the Normandale club as an associate membership director. Larsen's original interview with Owens focused on personal matters dealing with her religion, her marriage, and her parents, who were divorced. She too was asked whether she and her husband went to church and whether they prayed together. She was also asked to answer many questions regarding the breakup of her parent's marriage. She was then hired. During a subsequent interview, when Vice President Larson asked whether she was interested in a management position, she said that she was but volunteered that she did not think she was probably "Christian" enough for Owens. She said that she would be happy to work in management if Owens did not pressure and push her into being his kind of Christian, referring particularly to the Bible studies and prayer that were part of the mandatory managers meetings. The next day, Crevier dismissed her, giving as a reason that she had a "negative attitude" about the club, meaning that she had a "spiritual problem."

The examiner concluded that appellants had violated Minn. Stat. § 363.03, subd. 1(2)(b) by discharging Larsen because of religion and also had violated subd. 1(2)(c) by discriminating against Larsen because of religion with respect to the upgrading of her employment.

right to important information relevant to suitability for employment. In a recent survey, 100 vice presidents and personnel directors of "Fortune 1,000" companies, as reported in the Freeway News, Feb. 13, 1985, were asked: "What employee behavior disturbs you the most?" Their reported answers:

> By far, dishonesty and lying topped the list of the most objectionable behavior. If a company believes an employee lacks integrity, all of his or her positive qualities—ranging from skill and experience to productivity and intelligence—become meaningless.
>
> Next on the unpopularity hit parade came irresponsibility, goofing off and attending to personal business on company time.
>
> * * * *
>
> Employees who demonstrate an absence of commitment, concern, or dedication were often cited as employees not deserving of raises and promotions.

A professionalism survey report by the Minnesota Bar Association, reported in the March 1985 issue of *The Bench & Bar of Minnesota,* confirms this fundamental qualification:

> Honesty and Integrity:
>
> These are the bywords of professionalism in Minnesota as indicated by the 1,748 professionalism surveys returned this past December. For those who decry the lack of ethics and moral fiber in today's society, this is a resounding affirmation that persons with such attributes are indeed recognized. For the

> rest of us, such responses provide a heartwarming experience which re-affirms our inner convictions.

Without suggesting that nonreligious persons inevitably lack qualities of honesty or commitment to duty, there is a substantial degree of assurance that those of genuine religious commitment will have those qualities. It can hardly be doubted, furthermore, that those who are "antagonistic to the gospel," that is, antagonistic to Owens' manner of conducting his business, demonstrate "an absence of commitment, concern or dedication" to the interests of this employer valued by the surveyed personnel directors.

These limitations upon employee interviews are impermissible limitations upon freedom of speech, unless the state has a compelling interest which overrides that individual freedom. But it is only a discriminatory employment decision of the employer, not the inquiry itself, that should invoke the state's concern. The fact of the inquiry may prove the inquirer's knowledge of a person's religion or marital status and tie an inference from that knowledge to an otherwise unexplained adverse decision, but the examiner made no such linkage in these three cases. The most obvious example is that of Joseph Williams, for the complaint was limited to the inquiry only. The inquiries of Carnahan and Larsen concerning their parents' divorces were not linked to any violation based on their own marital status, nor could they have been.

A closer, yet questionable, linkage is that relating to Katherine Lamannsky, *infra* note 36. Even here, however, the information concerning her divorce did not surface in response to an inquiry by the employer. Where the record establishes, as here, that the employer does employ divorced

persons, the finding that Lamannsky's "status as a divorcee was what cost her the job" is most questionable. The cases of Carnahan, Larsen, and Lamannsky are the same to the extent that they prompted a gratuituous lecture by Owens and Crevier on marriage and divorce and the disparate responsibilities of husbands and wives in preserving troubled marriages. It was the unresponsiveness of Lamannsky to this attempted dialogue, not the fact of the divorce, that precipitated her rejection. The point is that a *lecture,* however anacronistic,[29] is not itself a violation of the statute.

There is remarkable vagueness in the examiner's assessment of questions to Carnahan and Larsen about reading the Bible, prayer, and church attendance. None of them identify a particular religion, although they concedely may distinguish the religious from the nonreligious, If, however, it is impermissible to ask whether a person

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[29]The Scriptural passages upon which Crevier relied for his gratuitous lecture placing the onus for divorce upon the wife apparently included 1 *Peter* 3:1, *Colossians* 3:18, and *Ephesians* 5:22-24, in which St. Peter and St. Paul enjoined wives to be "submissive" and "obedient" to their husbands. The same writers, however, enjoined husbands to "respect" and "love" their wives. 1 *Peter* 3:7, *Colossians* 3:19, and *Ephesians* 5:33. (The reciprocity of obligations in the familial relationship is further reflected in *Colossians* 3:20-21 and *Ephesians* 6:1-4, in which children are charged with a duty to "obey" parents, but parents are told not to "irritate" or "anger" their children). But over-arching all these surely is 1 *Corinthians* 13:1-13, the love chapter read at countless wedding ceremonies.

If the respective duties of husbands and wives are indeed disparate and immutable, however, that would be equally true of St. Paul's declaration that "[i]t is a disgraceful thing for a woman to speak in a church meeting," 1 *Corinthians* 14:33-35, and that "slaves [are to] obey [their] human masters in all things," *Colossians* 3:22. Conversely, if the injunctions to women and slaves are acknowledged to be anachronistic, the same may be said of any epistle being read to require discrimination between spouses. "[A]lmost all of the respondents [in the *Faith & Ferment* project] (94%) accept the understanding that women and men are both created in the image of God and are therefore equal in God's sight." *Faith & Ferment* at 34.

reads the Bible, which is itself a library of books, would it be impermissible to inquire whether a person has read such other classics as John Bunyan's *Pilgrim's Progress* or John Milton's *Paradise Lost* or *Paradise Regained?* Or would a conversation about the book *Faith & Ferment* be impermissible in an employment context?

The preoccupation of the examiner with Bible studies on company premises has been considered in the forepart of this opinion as an issue of religious freedom. It arises again as an issue of freedom of speech from the order of the examiner prohibiting "soliciting or suggesting participation in Bible studies." This is so patently unconstitutional as to require no other comments beyond identifying it.

2. Finding: dismissing Carnahan,[30] Larsen,[31] and Robert Severin[32] from their employment on religion-based grounds.

The right of this employer to establish the work environment, including mandatory Bible Study for managerial employees and voluntary sessions for other employees, has been extensively discussed in Part II. The interrogation of Carnahan and, to a lesser degree, Larsen was rather extensive. But it seems clear that they were dismissed for

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[30]*See supra* note 25.

[31]*See supra* note 26.

[32]*Robert Severin* was employed as a programmer-associate membership director at the Midway and Apache clubs. On frequent occasions throughout 1982, Severin was asked by Owens, Larson, and Crevier to attend the weekly Bible studies conducted by the manager of the Midway club. Severin is a Roman Catholic who believes that worship should be private or "in church" and kept out of the workplace. He declined to join in the Bible studies. In January 1983, Severin voiced the opinion that the club's staff and management were not as motivated or showing the same degree of enthusiasm that they had under a previous manager. Shortly after the staff meeting ended, Severin was dismissed for having a "bad attitude." Severin acknowledged on cross-examination that no one in management ever directly told him that he would lose his job if he did not attend Bible studies or told him that he lost his job because of non-attendance at them.

"bad attitude" or "negative attitude" in asserting objections to this religious work environment. Severin complained that the staff were not as motivated as they had been under prior management. Dismissal of malcontent employees is not a violation of the statute.

3. Finding: refusing to promote Carnahan,[33] Larsen,[34] and Steven Bruhjell[35] to managerial positions on religion-based grounds.

This issue has been fully considered in foreparts of this opinion with respect to Owens' right to have managers who will be compatible with the basic company policy to be a "discipleship." Unique, however, is the examiner's reaching into conversations during a social engagement between Steven Bruhjell and the Owens family and an at-home conversation between Bruhjell and Vice President Larson to find a religion-related violation of the statute. Unlike Carnahan and Larsen, moreover, Bruhjell resigned and was not dismissed.

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[33] *See supra* note 25.

[34] *See supra* note 26.

[35] *Steven Bruhjell* was employed as an associate membership director at the Normandale club. Shortly after he started working at Normandale, he played an after-hours racketball game with Arthur Owens and two of Owens' daughters. After the game, Bruhjell and the three Owens got into a discussion on religion, during which Owens became "strident" and "tried to advance his beliefs" on Bruhjell, beliefs with which Bruhjell openly disagreed. He also had been invited but declined to attend Bible studies. In late 1974, after Bruhjell had been passed over for a promotion, he was told by his then roommate, Vice President Larson, that he would not be promoted until he became a born-again Christian. In late 1976 Bruhjell decided to speak directly to Owens in an effort to find out if it was true that the only reason he had not been promoted to management was because of his religious beliefs. Owens admitted to him that that was the only reason. Shortly thereafter Bruhjell resigned his employment because he felt he had no future in appellant's organization.

The examiner held that appellants violated Minn. Stat. § 363.03, subd. 1(2)(c), by discriminating against Bruhjell because of religion with respect to upgrading of his employment.

4. Finding: refusing the applications for employment of Katherine Lamannsky,[36] Marilyn Crosby,[37] and Linda Perkins[38] because of marital status.

An issue not heretofore considered relates to the refusal to employ Crosby and Perkins because they cohabited with persons of the opposite sex to whom they were not mar-

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[36]*Katherine Lamannsky* was interviewed for a receptionist position by Crevier at the LaSalle club in July 1980. During the interview Crevier learned from the application that she was divorced. He began to probe about the details why Lamannsky had gotten divorced, and she refused to tell him beyond the general statement that she and her husband had grown apart. Crevier told her that the man was the head of the household and that if she had tried to work it out the marriage would have stayed together. He reinforced his point with Bible passages. Because she persisted in refusing to answer Crevier's inquiries along this line, Crevier told Lamannsky that he did not feel she would be fit to work at the club. She thanked him and left. No specific reason was given for not employing her.

The examiner found that appellants violated Minn. Stat. § 363.03, subd. 1(2)(a), by refusing to hire Lamannsky because of marital status.

[37]*Marilyn Crosby* was interviewed for an associate membership director's position at the Apache club. Crosby was asked personal questions only, such as whether she had any problems with her father, whether she had roommates, and with whom she lived. She answered all of the questions, including telling Crevier that she was single and that she had recently begun sharing a house with her boyfriend. Crevier thereupon terminated the interview, telling Crosby that "we won't be able to hire you because you live with your boyfriend." He also told her that if she moved out she could have the job.

The examiner found that appellants violated Minn. Stat. § 363.03, subd. 1(2)(a), by refusing to hire Marilyn Crosby because of marital status.

[38]*Linda Perkins*, along with other employees, was interviewed to see if she would be hired under Owens' new management when he bought the Minnetonka Racket and Swim Club. She had been employed as a file clerk and child-care supervisor but, although Owens did not intend to provide child-care services and had no employment then available for an office worker who could not type, Owens continued the interview to see if there was something that could be done to keep Perkins employed in some other way. He asked her whether she was a Christian and inquired about where and with whom she lived. She told him that she lived with her fiance, whereupon the interview terminated forthwith, and Owens said to her: "You realize that it is sinful, and it is sinful to God, living out of wedlock * * * and since it is sinful to God, it is sinful to me."

The examiner found that appellants violated Minn. Stat. § 363.03, subd. 1(2)(a), by refusing to hire Linda Perkins because of marital status.

ried.[39] The examiner acknowledges in his memorandum that there was in this relationship a clear inference of sexual relations between the cohabiting couples. Minnesota Statutes § 609.34 (1984) declares such relationship to be a crime:

> When a man and a single woman have sexual intercourse with each other, each is guilty of fornication, which is a misdemeanor.

Given the apparently wide-spread incidents of such living arrangements today, the inquiry by Owens is not surprising. Owens did not wish to, and is not required to, "subsidize" criminal behavior. The extraordinary response of the examiner to this defense is that as a matter of legislative intent, the subsequently enacted Human Rights Act "superseded" the criminal statute, a judgment that will come as a surprise to those legislators who have regularly but unsuccessfully authored bills to repeal the fornication statute. The examiner may as well have asserted the repeal of Minn. Stat. § 144.651 (1984), the Bill of Rights for Patients and Residents of Health Care Facilities, which by subdivision 28 provides:

> Residents, if married, shall be assured privacy for visits by their spouses and, if both spouses are residents of the facility, they shall be permitted to share a room, unless medically contraindicated and documented by their physicians in the medical records.

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[39]The finding does not relate to sex discrimination, but the cease and desist order refers to discrimination on the basis of both sex and marital status. "Sex" obviously refers to gender and not sexual activity.

The plain purpose of the statute is to preclude an employer from having a policy not to employ single persons *or* divorced persons *or* married persons. It is at the least a curiosity that in his several findings the examiner did not find discrimination against persons in one or the other status but against all three, a strange application of the statute.

(emphasis supplied). This statute, like the fornication statute, grants marital status protection in sexual relations only to married persons.

The examiner's effort to find discrimination in this refusal of employment demonstrates again his unreasonable interpretation and application of the Human Rights Act, for his determination that the criminal statute was susperseded by a civil statute is plainly wrong. As we held in *Target Stores, Inc.*, 279 Minn. at 473-74, 156 N.W.2d at 925, "[t]he principle of implied statutory repeal is not favored"; rather, as stated in *State v. Sobelman*, 199 Minn. 232, 236, 271 N.W. 484 (1937):

> Before it can be said that a later act is intended to be a substitute for the earlier, "there must be unmistakable intent manifested on the part of the legislature to make the new act a substitute for the old and to contain all the law on the subject; for mere similarity in the provisions of the two statutes is not enough to effect a repeal, even though the similarity may be such to cause confusion or inconvenience."

It is preposterous to impose sanctions upon an employer, particularly this employer, who refused to employ persons whose conduct constitutes criminal misbehavior.

5. Finding: denying Miriam Cameron[40] full and equal enjoyment of public accommodations because of religion.

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[40]*Miriam Cameron* had joined the LaSalle Sports and Health Club in 1978. Cameron, a Jew, had noticed no religious emphasis at the club during the first 18 months of her membership, but in mid-1980, she began to notice an increase in the proliferation of fundamentalist Christian literature. The specific charge involves a conversation that occurred in August 1980 following the publication of a book by Cameron entitled *Hello, I'm God and I'm Here to Help You*. Cameron and Vice President Crevier met in a club office. He belittled Cameron's views and lectured her on fundamentalist Christian doctrine. Crevier talked in a loud voice, leaned across the table, and had a stern expression on his face;

The issue presented by this finding does not involve discrimination in matters of employment and has not been heretofore considered in this opinion. It is yet another example of an ambitiously expansive administrative application of the Human Rights Act, this time involving discrimination in public accommodations—a provision which, by its terms, is both civil and criminal. *See* Minn. Stat. § 363.101 (1984), *supra* note 20.

Cameron, a club member and not an employee, as the examiner found, initiated a conversation in the office of Crevier's office on her own initiative, Cameron was not a which were contrary to Crevier's religious beliefs. There ensued a vigorous and "strident" disputation on religious grounds which disturbed, "overwhelmed," and "totally demoralized" her. "The problem," the examiner said, "is not with what [Crevier] said, but with how he said it." The examiner held that it was "treatment so at variance with what would reasonably be anticipated absent discrimination * * * that discrimination is the probable explanation for [Crevier's] conduct." Just as she came to Crevier's office on her own initiative, Cameron was not a captive but free to end the discussion by simply departing. It might well be that Crevier's role was not winsome, but it is utterly absurd to hold that it was a discriminatory denial of the right to services of the club and to order a refund of Cameron's initial membership fee. It is noteworthy, moreover, that Cameron remained as a club member for

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Cameron was visibly shaken. Thereafter, both Cameron and her husband decided to terminate their membership and asked for a refund, which was denied.

The examiner found that appellants had denied Cameron the full and equal enjoyment of its services and facilities as a place of public accommodation because of religion, within the meaning of Minn. Stat. §363.03, subd. 3.

4 or 5 months following this episode, which would seem to indicate that the event was not as troublesome as she asserted.

To hold, as here, that a vigorous and robust debate on a religious subject, however controversial, may by statute or administrative order be prohibited or made subject to a monetary penalty is a most flagrant denial of freedom of speech.

## IV.

*The Minnesota Constitution as Exclusive Basis of Decision*

The constitutional issues raised in this case focus on the Minnesota Constitution as the adequate and independent basis for decision, to the exclusion of the United States Constitution. A current exposition of this emerging constitutional practice by Minnesota lawyers Terrence Fleming and Jack Nordby in 7 Hamline Law Review 51 (1984), *The Minnesota Bill of Rights: Wrapt in the Old Miasmal Mist*, clarifies the power of state courts to interpret and apply their own constitutional Bill of Rights and the specific criteria that should govern the decision whether the state's Bill of Rights mandates departure from the minimum standards of the federal constitution.[41] Among several other law review commentaries, *see also* Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707 (1983), and *Linde, E. Pluribus*, 18 Georgia L. Rev. 165 (1984).

It is axiomatic that a state may interpret its state con-

[41]The authors are practitioners of criminal law and write from that perspective, but the basic principles are, of course, the same with respect to issues of free speech and free exercise of religion.

stitution to offer other and more—but not less—protection of individual rights than does the federal constitution. *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 81 (1980); *Oregon v. Hass,* 420 U.S. 714, 719 (1975). State courts are, and should be, the first line of defense for individual liberties within the federalist system. The Minnesota Bill of Rights, indeed, antedated the adoption of the fourteenth amendment, by which the federal Bill of Rights was in large measure made applicable to the states. The result is that the citizen has two sources for the protection of his or her civil liberties. This state should not abdicate its responsibility to effectuate both lines of constitutional defense.

This does not mean, however, that the state should in all circumstances construe its own constitution more expansively than the federal constitution, particularly where their comparable provisions are textually identical, for the decisions of the United States Supreme Court inherently are of persuasive, although not dispositive, force. As Justice Hans Linde, in *State v. Kennedy,* 295 Or. 260, 666 P.2d 1316 (1983), urging that as a matter of judicial economy a state court should always consult dispositive state grounds for decision, without needless resort to federal grounds for decision, responded to a nonsequitor contention that the United States Supreme Court's decisions under substantially identical texts "not only deserve respect but presumptively fix its correct meaning also in state constitutions":

> The state finds some difficulty in explaining why this should be so. If state guarantees are presumptively bound to interpretation of the federal Bill of Rights merely because they are federal, the argument extends

> similar force to lower federal court decisions when the Supreme Court has not spoken. If the argument is only that the federal guarantees are older than the Oregon Constitution, the fact, of course, is that they were adopted in order to bind the federal government to guarantees already established in the existing states.

*Id.* at ——, 666 P.2d at 1322.

A strong basis for an independent interpretation, however, may be presented where invocation of the Minnesota Bill of Rights, as in this case, concerns conditions unique to this state. As Fleming and Nordby suggest:

> Innovative examination of this factor provides cogent arguments for engaging in independent interpretation as well as significant direction for decision-making. Several questions should be considered in examining this factor: whether Minnesota's history and traditions are relevant to the controversy; whether the controversy is local in nature; whether the resolution of the controversy rests primarily in a determination of localized facts; whether the Minnesota Supreme Court is in a better position than the federal courts to make the adjudication because of its superior knowledge of, experience with, and proximity to the controversy; whether the controversy warrants an individualized, experimental resolution of statewide applicability or necessitates a broad, uniform resolution of nation-wide applicability; and whether there are other circumstances unique to Minnesota

> which mandate a decision contrary to the existing federal doctrine.[42]

(footnotes omitted). 7 Hamline L. Rev. at 76.

The basis for a different and more expansive interpretation is stronger yet where the provisions on the same subject are textually different. Unlike article 1, section 16, *supra* note 21, the first amendment to the Constitution of the United States more cryptically provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

Fleming and Nordby aptly observe concerning this difference:

> [T]he state Bill of Rights expressly grants affirmative rights in the areas of free press, free speech and religious worship while the corresponding federal provision simply attempts to restrain governmental action. In effect, the language of the state constitution appears to afford Minnesota citizens greater protection than does the Federal Constitution. It also serves to lessen the force of United States Supreme Court decisions which only refer to the more limited protection afforded by the Federal Bill of Rights.

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[42]The Minnesota religious milieu, expressed in the language of its constitution,-*supra* note 21, and contemporaneously reflected in the *Faith & Ferment* project report, *supra* notes 18 and 19, relates to Minnesota's history and religious and sociological traditions. The controversy, moreover, involves a business lacking interstate commerce characteristics and is therefore basically local in nature.

(footnotes omitted). 7 Hamline L. Rev. at 67-68.

Chief Justice Samuel J. Roberts of the Pennsylvania Supreme Court, now retired, in a speech delivered a year ago before members of the Wyoming bar and representatives of the University of Wyoming College of Law (*reprinted in* 17 IJA Report of the Institute of Judicial Administration No. 2 (Winter 1985)) declared state court reliance on the adequate and independent state grounds for decision "the most significant development in federal-state relations over the last decade"; it reduces the burden of our federal court system, but even more importantly, lends "*stability, integrity,* and *finality* to state court decisions and thus makes for a better court system—a system governed, controlled, and supervised by state court adjudications, for state judges, practitioners, and litigants." (emphasis in original). Discussing several cases in which state courts had undertaken to rely exclusively on their own constitutions but which had been nonetheless reviewed by the United States Supreme Court, Justice Roberts points out that "where a state court intends to rest a decision on state law, the state court in its opinion must clearly and specifically articulate that its decision is based exclusively on state law *and must disclaim even the citation to analogous federal cases.*" (emphasis added). For that reason, this dissenting opinion neither cites federal cases on freedom of speech and religion nor responds to those cited in the majority opinion.

## V.

### *Conclusion*

Mindless antipathy of one person toward another of different race, religion, gender, or marital status is

repugnant to anyone who claims to be civilized. History is replete with evidence of its destructive effect on the lives of people occupying the close quarters of this planet. Simply in economic terms, the denial of the opportunity to employ or be employed solely because of such antipathies bears a high cost to both individuals and the state itself.

The objectives of the Human Rights Act are, therefore, salutory. Legislation, however, as demonstrated in this case, can be repressive if not administered with reason and consistent with constitutionally-guaranteed civil liberties.

The numerosity and nature of the state's complaints against Owens obscures an important and undisputed fact of which the majority opinion takes note: Owens' business employs persons of different races and religions--Catholics, Jews, and Protestants of various denominations—or no religion, men and women, and single, married, and divorced persons. The acts of alleged discrimination, moreover, were not motivated by Owens' hatred of a person of religion or status different from his own; indeed, by his own religious convictions he is constrained by the great commandment to love his neighbor.

The posture in which these complaints against Owens were adjudicated is one for which the Human Rights Act was not intended. The examiner himself took some note of this:

> This case is somewhat unique, in that the alleged discrimination is not against individuals who practice a religion, but against those who either refuse to practice or are offended by the promotion of a religion. This is the opposite of a law suit where the

charges are discrimination against a race, or a religious group, or preference to one sex over another.

There is, regrettably, in this case latent spirit of indifference, if not hostility, to deeply-held religious beliefs contrary to what I believe is the spirit of the people of Minnesota.

I dissent, with respect, from the decision of the majority which affirms the decision of the hearing examiner, for I would in all respects reverse and put an end to this unfortunate litigation.

YETKA, Justice (dissenting).

Prior to receiving the dissent of Justice Peterson, I had written a special concurring opinion reluctantly accepting the majority decision, but expressing strong reservations. After reading Justice Peterson's scholarly and eloquent dissent, however, I join him in dissenting.

There is some controversy on how much significance could be attached to questions by defendants of female employees as to their marital status and whether they have their husbands' or fathers' consents to seek employment. I wish to make it clear that I do not believe it proper under any circumstances for an employer to ask for such consent. Women's rights are too far advanced to turn the clock back to the 19th century. In my opinion, they are entitled to equal protection in seeking employment under both the federal and state constitutions whether an ERA amendment is adopted or not. Such a line of questioning is totally improper under the statute and the constitutions.

However, while employers have certain responsibilities under this statute, it does not totally abrogate their

rights to obtain background information on prospective employees. The majority opinion states that, "[w]hile we recognize that in order to make informed and intelligent employment decisions, employers must be permitted some leeway to question an employee or applicant about his or her background, upbringing and perspective." I'm not sure, however, that that is sufficient guidance or reassurance to employers. I am fearful that the opinion will be too broadly interpreted. While individual preferences might differ as to what characteristics should exist for a good employee, certain qualifications appear to be universally recognized as desirable; for example, is the prospective employee in good physical and mental health; is he/she likely to be honest and a conscientious worker; can he/she get along with fellow employees; is he/she likely to get to work on time; be free of frequent absences and perform his/her job cheerfully, efficiently and diligently? The fact is that there is a high correlation between being a good practicing Christian and fulfilling each of the foregoing qualifications.

If an affluent employer wants to spend the money to do so, he can easily, quietly have an investigation made of all prospective applicants and learn all he wants to know about that person or persons. A small or marginal employer, on the other hand, may not be able to afford such an investigation. Yet, the consequences of hiring an employee are undoubtedly more dire and harmful to the small employer than the large. Therefore, the act that claims as its purpose the prevention of certain discriminations may, in fact, result in quite another discrimination against certain employers.

Here is an act which has as its stated purpose the elimination of discrimination in employment. It has been rightly invoked to protect minorities—in color, gender, and re-

ligion. Yet, it would discriminate against the majority religion in the United States since the nation's founding, namely, Christianity. This decision would deny a Christian the right to practice his belief in the marketplace. It would deny an employer the right to basic information about a prospective employee that affects not only the well-being of the employer and his business, but also that of the prospective employee's fellow employees. I find the findings so repugnant that it reaches the stage of being ridiculous. True, the majority opinion points out that opinions of the United States federal courts would suggest that you may have a decision upholding one person's constitutional rights that effectively deny another person his or her rights. That may be so, but where an act can be interpreted to prevent such a delicate balancing act, why shouldn't it be so read?

As one of the original authors of fair employment practices legislation in the Minnesota Legislature in the 1950's when such proposed legislation was extremely unpopular, I firmly believe that an employer should not be allowed to discriminate on the basis of race, color, gender or creed. I also believe just as firmly that an employer cannot be denied his constitutional rights to information essential to making a meaningful selection of a new employee. We are at that stage in the evolution of American constitutional history where we are either going to be one nation indivisible with equal rights for all or we are going to become a nation with groups of citizens within that are virtually separate nations of themselves. The time has come to strike down all discrimination, all special privileges and treat all of our citizens equally before the law.

I, therefore, join Justice Peterson in finding that, under the Minnesota Constitution, defendants' constitutional

rights are violated by the Minnesota Human Rights Act. The proper disposition of this case perhaps should be to remand to the hearing examiner; however, I agree with Justice Peterson that the case has punished defendants far beyond whatever actions were taken on their part. There comes a point where enough is enough and the case ought to be terminated here. I, therefore, would reverse.

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## APPENDIX B

### STATE OF MINNESOTA
### OFFICE OF ADMINISTRATIVE HEARINGS
### FOR THE DEPARTMENT OF HUMAN RIGHTS

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In the Matter of State of Minnesota, by Marilyn E. McClure, and her successor, Irene Gomez-Bethke, Commissioner, Minnesota Department of Human Rights,

Complainant,

v.

Sports and Health Club, Inc., d/b/a St. Louis Park Sports and Health Club, Apache Sports and Health Club, Midway Sports and Health Club, Normandale Sports and Health Club, LaSalle Sports and Health Club, Northland Park Sports and Health Club and Tonka Sports and Health Club, and Arthur W. Owens, Marc Crevier and Forest Larson,

Respondents.

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### FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

The above-entitled matter came on for hearing before State Hearing Examiner Richard C. Luis on July 18-22,

August 1-3, August 12, August 15-16, September 20-21, and September 23, 1983, in Courtroom 12 of the Minnesota Office of Administrative Hearings, Third Floor, Summit Bank Building, 310 Fourth Avenue South, Minneapolis, Minnesota. The record in this matter closed on April 17, 1984, when the Complainant filed a final Reply Letter.

Clyde F. Anderson, Meagher, Geer, Markham, Anderson, Adamson, Flaskamp and Brennan, Attorneys at Law, 2250 IDS Tower, 80 South Eighth Street, Minneapolis, Minnesota 55102, appeared on behalf of the Respondents (hereinafter also called "the Employer"). Elizabeth v. Cutter, Special Assistant Attorney General, 515 Transportation Building, John Ireland Boulevard, St. Paul, Minnesota 55155, appeared on behalf of the Complainant. She was assisted in her presentation by Special Assistant Attorneys General Richard L. Varco and Mark Levinger, 1100 Bremer Tower, Seventh Place and Minnesota Streets, St. Paul, Minnesota 55101.

## NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2 (1983 Supp.), this Order is the final decision in this case and under Minn. Stat. § 363.072 (1983 Supp.), the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69 (1983 Supp.).

## STATEMENT OF ISSUES

The issues in this case are whether, with respect to the Charging Parties herein and other persons similarly situated:

(a) the Respondents committed unfair discriminatory practices in employment based on religion, marital status or sex within the meaning of Minn. Stat. § 363.03, subds. 1(2) and 1(4) (a); and

(b) The Respondents committed unfair discriminatory practices in the provision of a public accommodation because of religion within the meaning of Minn. Stat. § 363.03, subd. 3; and

(c) Respondents Arthur Owens, Marc Crevier and Forest Larson aided and abetted Respondent Sports and Health Club, Inc., to engage in practices forbidded by Minn. Stat. § 363.03, subds. 1(2), 1(4) (a) and 3, within the meaning of Minn. Stat. § 363.03, subd. 6 and;

(d) Respondents Arthur Owens, Marc Crevier and Forest Larson are protected by the First and Fourteenth Amendments to the United States Constitution and Article I, § 16 of the Minnesota Constitution, from being held liable for any violations of Minn. Stat. § 363.03, subds. 1(2), 1(4) (a) and 3.

Based upon all of the files, records and proceedings herein, the Hearing Examiner hereby makes the following:

## FINDINGS OF FACT

### THE RESPONDENTS - HISTORY AND PHILOSOPHY

1. The individual Respondents in this matter, Arthur Owens, Marc Crevier and Forest Larson, are the owners and operators of seven Sports and Health Club operations in the Twin Cities Metropolitan area. Taken together, the seven operations are Respondent Sports and Health Club, Inc., a closely held, for-profit Minnesota corporation. From an operational standpoint, Owens is the President,

Crevier is Vice President in charge of training, sales and club operations and Larson is Vice President in charge of finance and office operations. The duties of Crevier and Larson occasionally overlap in practice.

2. The seven Sports and Health Clubs are each operated by and answer to a Club Manager. There are, from time to time, Assistant Managers at the larger clubs (Normandale in Bloomington, Northland Park in Brooklyn Park and LaSalle Court in downtown Minneapolis). The other managerial personnel employed by the Respondent include an Office Manager and a Head of Maintenance. All management personnel are promoted from within the Respondent's organization, and, since the mid-1970's, it has been the Respondents' policy to elevate only "Born-Again" Christians into management positions.

3. At each Club, associate membership directors, also called "programmers", are employed for the purpose of selling memberships and the development and supervision of exercise programs for Club members. There are approximately 40 to 45 full-time associate membership directors in the Respondents' employ. The Clubs have a total current membership of approximately 18,000 persons, or 400 to 450 per full-time "programmer".

Each Club also employs at least two full-time receptionists who greet the members and the general public, sell memberships and help to assign persons to a "programmer". Locker room attendants, babysitters, maintenance persons, office staff at the St. Louis Park headquarters and part-time personnel (mostly receptionists and associate membership directors) make up the balance of the Respondents' 140-150 employees. At all times relevant to this proceeding, the Sports and Health Clubs experienced

a rapid turnover in sales personnel (receptionists and "programmers") and were constantly in search of "qualified" people to fill these positions.

Every person who applies for an employment position with the Respondents, and who will be dealing with the public (receptionists and associate membership directors) must be interviewed and approved by the Respondents' President, Arthur Owens, prior to hire. The interviews with Owens generally follow an initial interview by a Club Manager or one of the Vice Presidents. Neither Owens, his Vice Presidents, or his Club Managers will hire anyone who, in their view, is "antagonistic to the Gospel". In order to ascertain this, the Respondents inquire into the applicants' religion. It is the Respondents' sincere belief that a person's "religion" permeates, motivates and directs every thought and action in a person's life, and, in order to find out "what kind a person" they are, "religious" inquiries are made.

4. Membership at a Sports and Health Club is available to any adult member of the public. Family memberships are also available. As of the time of the hearing, the initial membership fee was $430, which covers the initial setting up of an exercise program, the commission (10 percent) for the person making the sale, and dues for one year. After the first year, dues continue at $14.00 per month. All parties to this proceeding agree that the Clubs' facilities are excellent and that the membership dues are generally lower than those of the competition (in the Twin Cities Metropolitan area).

5. Although Crevier and Larson had, at the time of the hearing, purchased most of the Respondents' stock from Owens (who originally held 100 percent), Owens has been

the driving force behind the Sports and Health Clubs from their inception and retains (as President, with a final veto on all management and middle-level personnel decisions) that power today.

6. The Respondents appended a "Statement of Faith", labeled "Exhibit A" (Respondents' Exhibit 4) to their Answer to the original Complaint in this matter. Each testified that this "Statement of Faith" contain a summary, with supporting Bible passages, of the basic pillars of his Christian faith, and that his religious beliefs make it impossible for him to separate his personal and business lives from his life in harmony with Jesus Christ, whom he accepted as the Lord of his life and as his personal Savior at the time of his spiritual "rebirth".

The Respondents' belief that Jesus Christ is in actual control of their lives, because they have made a personal commitment to act as he guides them in all aspects of their lives, including acting as a "witness" for Him, reflects a tenet of faith commonly associated with "Born-Again" Christianity.

Arthur Owens, who is 59 years old, became "Born-Again" in Christ in 1957. Forest Larson (age 32) and Marc Crevier (age 33), decided to receive Christ as their personal Lord and Savior (to become "Born-Again") in approximately 1964 and 1974, respectively.

The Respondents' religious beliefs, as outlined above and as detailed throughout the remainder of this decision, are sincere.

7. Arthur W. Owens, after returning from military service in World War II, worked in partnership with his father in the restaurant business in Minneapolis from 1945 to 1957. After one of their two "Baltimore Dairy Lunch"

restaurants was condemned to make room for the construction of the downtown branch of the Minneapolis Public Library, and after his father retired, Owens decided to switch careers. He sold his other restaurant and started the first Sports and Health Club, which opened in St. Louis Park in 1959. After that, the business expanded with the opening of a Club on the East Side of St. Paul in 1961 (which closed in 1965), and Clubs in the Midway Shopping Center in St. Paul and at Apache Plaza Shopping Center in St. Anthony, which both opened in the fall of 1961. Sports and Health opened in LaSalle Court in downtown Minneapolis in 1970, at Normandale and Bloomington in 1973, and in Brooklyn Park (the Northland Park Club) in 1977. The corporation bought the Old Minnetonka Racquet and Swim Club and converted it to a Sports and Health Club in 1983, and plans to open another Sports and Health facility in St. Cloud this year.

8. Arthur Owens made his decision to embrace Jesus Christ as his personal Lord and Savior in 1957, shortly after his fourth child, Cindy Jo, was killed after being run over by a car in front of the family's house just before her third birthday. Owens, who was raised as Presbyterian and belonged to a Presbyterian church at the time of Cindy's death, went through a series of traumas, and even considered suicide, after the fatal accident and prior to his spiritual rebirth.

9. Owens' growth and development as a "Born-Again" Christian was slow and steady. For several years, until approximately 1964, he kept his personal acceptance of Christ to himself, a period of what he calls living in the "secret service". During this time, Owens stayed active in his Presbyterian church.

In 1964, Mr. Owens decided to take over the spiritual leadership of his home and began a program of family devotionals. In 1969, he became a stricter disciplinarian with respect to his children's development and education, including the decision to impose corporal punishment upon them. That same year, in opposition to the Minnetonka School Board's decision to implement a program of sex education for elementary school students, Owens took his son out of the system and started his own school, Chapel Hill Academy, which is still in operation for grades K-12 and stresses education according to fundamentalist Christian principles. In the mid-1970's, Mr. Owens made the decision to operate his Sports and Health Clubs as "discipleships" for Christ. Since the departure of Ira Rosen, who is Jewish, as manager of the Normandale Club in 1975, no one has been elevated into a management position with the Respondents unless they shared Owens' fundamentalist "Born-Again" Christian beliefs. After Rosen's departure, Owens also decided to eliminate the position of Executive Director in his organization, a position whose duties included the hiring of all sales personnel (receptionists and associate membership directors) and take personal responsibility for the hiring of all such people. Since then, no one perceived by Owens, or his managerial personnel, as "antagonistic to the Gospel of Jesus Christ" has been offered employment as a receptionist or associate membership director.

Owens' employment interviews include reviewing the application and asking questions of the applicant to ascertain information on their religious views, their marital

status and living arrangements.[1] He explains to each prospect that the Sports and Health Clubs are a "Christian organization", that many of the employees are fervently evangelical, and asks whether the interviewee would be "uncomfortable" in such an atmosphere. Owens maintains that a technical background in sales, exercise and/or nutrition are less important to him than two basic qualifications for employment. They are that the applicant (1) possesses a "teachable spirit" and (2) follows a "disciplined life style". At the above-noted interviews, applicants have been asked, or questioning has been formulated with a view to finding out: to describe in detail their religious beliefs and practices; to give their reaction to the Respondents' religious beliefs and practices, or those of current employees, as outlined by the interviewer; to describe in detail their family lives, including the marital status of themselves and their parents, whom they live with, and if they live "out of wedlock". Women applicants have been asked, or questioning has been formulated with a view to finding out: if young and single, whether they have their father's (or parents') permission to work; if young and single and living away from home, whether they have their father's (or parents') permission to do so; if married, whether they have their husbands' permission to work. The Respondents also have made inquiries of this nature to certain of their employees. They have made decisions with respect to hiring and promotion based on the answers to such inquiries or the person's status with respect to such propositions.

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[1]Many of the questions asked by Owens of prospective employees are also asked by Respondents Crevier and Larson and the Club Managers. Since approximately 1976, the interviews applicants have with Owens have generally concentrated only on personal matters, because the first interview has already "screened" the applicant's other qualifications.

The decision to operate the Sports and Health Clubs as a "discipleship" for Christ was made at a time when the organization was in severe financial trouble and almost went bankrupt. Since that time, the Clubs' financial situation has become progressively more prosperous. Owens attributes the turnaround to his decision to take on his "Jewish business partner", Jesus Christ.

10. The basic operational model imposed by Mr. Owens on his Sports and Health Club operations since approximately 1974-5 is a structure and organization derived from the teachings of Bill Gothard, a former Chicago street preacher whose seminars, called "Institute in Basic Youth Conflicts", were first attended by Mr. Owens in 1973. Gothard's seminars are part of the outreach program of the Campus Crusade for Christ, a non-denominational, youth-oriented fundamentalist organization of "Born-Again" Christians which proselytizes and "witnesses" for Christ, primarily on college campuses, throughout the United States. Owens has been associated with the Campus Crusade since 1968. The outline of Gothard's six-day seminar (Monday-Thursday nights for three hours a night, all day Friday and Saturday, see Respondents' Exhibit 13) contains source material for job descriptions and performance evaluation forms presently used for persons employed in the capacity of associate membership directors for the Respondents.

11. After Ira Rosen resigned as Manager of the Normandale Sports and Health Club in 1975, Owens replaced Rosen with three co-managers—Nancy Albertson (who quit in 1976), Marc Crevier and Forest Larson. At that time, the other Sports and Health Clubs were at St. Louis Park, LaSalle Court, Midway and Apache. By the late

1970's, Crevier and Larson were also in operational charge, either personally or through managers selected by them and Owens and who agreed with their religious beliefs and managerial philosophies of the LaSalle Court, St. Louis Park and Northland Park (which opened in 1977) Clubs. The Midway and Apache Clubs remained under the operation and control of Jim Chapman, who had managed them since 1968 and had been attempting to purchase the two operations from Owens for several years.

In late 1981 and early 1982, after Chapman resigned when his attempt to purchase the Clubs met its final failure, Crevier and Larson assumed operational control at Midway and Apache as well. They installed persons whom they had personally trained and who shared their "Born-Again" Christian beliefs and managerial philosophy, Jeff Penney and Kevin Reilly, as the Club Managers and began to retrain the entire staff in order to bring their operational and personnel systems in line with the rest of the Respondents' Clubs.

12. In approximately 1979, Crevier and Larson began purchasing the assets of all of the Sports and Health Clubs, except those operated by Chapman, which Chapman himself was attempting to purchase from Arthur Owens. After Chapman's resignation in late 1981, Crevier and Larson began to purchase the assets of the Midway and Apache Clubs as well. These purchases were nearly complete at the time of the hearing. The record does not reveal who owns the assets of the Tonka Club or who will own the assets of the planned facility in St. Cloud.

13. At or about the same time that they began purchasing the Clubs from Owens, Crevier and Larson began to impose a "strict accountability book system" of sales

and member servicing methods upon all associate membership directors. See Respondents' Exhibit No. 14. Jim Chapman, who retained operational control of the Apache and Midway operations during the time he was attempting to purchase them, did not impose the rigid "book" systems on his associate membership directors. However, after assumption of control and ownership by Crevier and Larson, the "book" systems were imposed at the remaining two Clubs, by the Vice Presidents themselves or through Penney and Reilly, the new Managers. Some of the features of the "book" system imposed by Crevier and Larson are required "cold" calls to solicit potential members, a requirement to obtain a certain number of "referral" appointments (for prospective members) each week, requirements for the recording of "cold" calls and "referral" appointments, that each service of a member be recorded, that lists of clients and prospects be updated, that the members' programs be periodically updated, and recording of the periodic weighing and measuring of the members.

Since the "book" methods have been imposed, and Club Managers made strictly accountable for a daily updating of all required entries by their associate membership directors, the organization's profits have progressed upward. Other internal developments having an effect on profits at or before the time of the imposition of the "book" system include the closing of one Club (St. Paul Eastside) in 1965, a refinancing in the mid-1960's, a tighter accounts receivable system, the employment of an outside collection agency, the computerization of current membership dues status, the decision to drop commercial advertising and rely on word-of-mouth and across-

the-board cuts in base salaries at Apache and Midway in 1982.

14. In the mid-1970's, with the encouragement of Arthur Owens, Head Receptionist Merle Fisher started Bible studies for employees of the Normandale Sports and Health Clubs. The sessions were held in the Club's lounge during times when the Club was closed to the public. Forest Larson and, on at least one occasion, Marc Crevier attended Ms. Fisher's studies, which were usually led by her, but, on one occasion, was led by Arthur Owens. Ms. Fisher continued to have Bible studies in her home after she left the employ of Sports and Health in 1976, and conducts them to this day. Certain of the Respondents' employees still attend.

In approximately 1980, Bible studies for employees began to re-appear at the Sports and Health Clubs. Owens had conducted Bible studies in his home, using material distributed by the Campus Crusade, and he had invited Larson and Crevier. Inspired to spread the word to others by the message and material presented to them at Owens' residence, the two Vice Presidents began to institute Bible studies for employees at the Clubs they ran. None were conducted at Midway and Apache until Jim Chapman resigned, but Bible studies have been instituted by the new managers at the above locations. Club Managers at each location eventually took over the leading of these study sessions. The employee Bible studies continue at the Clubs to this day, although some are now led and organized by non-management personnel. The Managers of the two largest Clubs, John Stewart (Normandale) and Glen Beckett (Northland Park) still conduct the Bible studies themselves. Attendance is, and always has been, volun-

tary, but encouraged. Employees who do not attend are frequently asked to join. The studies are held once a week, during the shift change between 2:30 and 3:00 p.m.

Bible studies for management personnel have been required at Sports and Health Clubs, Inc., since Owens decided to run the Clubs as a "discipleship" in the mid-1970's. The studies were initiated by Owens, and he has led many of them to the present time. These sessions take place in conjunction with management meetings at the corporate headquarters in St. Louis Park.

15. Sports and Health Club sales employees are required to attend two meetings a week—one on Monday, at which the business and sales goals of the Club are reviewed and new goals are established, and one on Wednesday, for general training in exercise methods, new equipment, diet and nutrition, and sales motivational techniques.

Sales personnel are also required to attend meetings of the Sports and Health Club's Chapter of Toastmasters International, which meets periodically at a motel in Golden Valley. As required by the Charter of the International organization, all such sessions start with a prayer. Since many of the members-employees are fervently evangelical, it is not unusual for the presentations at Toastmasters to be religious in nature.

16. For at least the last decade, the Sports and Health Clubs have stocked religious oriented, evangelical, fundamentalist inspirational literature in the form of leaflets, pamphlets, books and magazines in their lounges. See Respondents' Exhibit 11. In addition, for the last several years, the Clubs have been decorated with signs containing messages reflecting the religious beliefs of management.

## THE CHARGING PARTIES

*Robin Carnahan*

17. Robin Ann Carnahan was employed as an Associate Membership Director at the Normandale Sports and Health Club from June 18, 1977 to May 30, 1978.

Ms. Carnahan had an educational and employment background in dance instruction and physical training before interviewing for employment with the Respondents. She is also a talented graphic artist.

18. Prior to being hired by the Respondents, Ms. Carnahan had two employment interviews, one with Larson and Crevier and one with Arthur Owens, which Larson and Crevier attended. The first interview consisted of questions regarding experience and background in physical fitness and instruction and as to her attitude towards selling.

The second interview, which lasted about one hour, consisted of questions by Owens related to her religion, her marriage and her family. Among other things, Owens asked Carnahan if she was a Christian (she is a Roman Catholic), if she read the Bible, if she went to church, if she would speak freely about her religion to other people, whether she was married, if she and her husband prayed together and went to church together and whether her parents, who were divorced, were still married. Carnahan, who had been alerted by an acquaintance to expect questions of this nature from Owens, felt extremely uncomfortable at the interview, but answered the questions.

After the interview, Owens had reservations about hiring Carnahan because he perceived a possible antagonistic attitude (a reluctance to speak freely) in her "counte-

nance" during the interview, especially when she answered questions about her parents and their divorce. Crevier and Larson, who were impressed with Carnahan's other qualifications, persuaded Owens to approve the hiring.

19. During the course of her year in the employ of the Respondents, Robin Carnahan proved to be a talented and popular employee, both among the members and among her peers. She developed the Club's dance studio, fitness festival, "Superstars" competition, and an arm wrestling contest, and did all of the graphics work for the Club, which often involved working overtime. Her employment performance evaluations were generally excellent, but reflect that she was occasionally late and missed some staff meetings. After one such evaluation, Larson and Crevier told Carnahan that they were considering her for the "female" co-managership of the Club, which was vacant after the departure of Nancy Albertson.

On three occasions, Carnahan was cautioned for breaking Company work rules—for working on a sign for her husband's karate school on Sports and Health Club time, for taking a drink of champagne in the Club on Christmas Eve, and for borrowing cash from the Club's T-Shirt fund to buy a wedding present for an employee (Syd Schugart), who was marrying a former employee (Rick Danmeier). She was never warned that her job was in jeopardy for any of these infractions, or combination thereof.

20. On May 30, 1978, Crevier conducted separate conferences with Carnahan and other associate membership directors at the Normandale Club to discuss their goals within the organization and their general attitude.

At the conference with Carnahan, Crevier asked for her opinion of Owens. She expressed her disapproval of religious-oriented employment interviews and of the sale of Bible in the Club's lobby. She also compared the unavailability of health-oriented literature at the Club with the great volume of Christian material available for members in the lobby and lounges. Carnahan, still thinking she was a candidate for management, also asked Crevier if it was true that all management employees were required to attend Bible studies as part of regular managers' meetings and he replied that it was true. When asked by Carnahan if it would be possible for a manager or assistant manager to attend only the business portions of such meetings, Crevier got upset, told her that if that was her attitude he would have to "let her go", and told her that in order to get her job back she would have to get clearance from Mr. Owens.

21. On June 2, 1978, Robin Carnahan met with Arthur Owens. He explained to her that although he was aware she had done a very good job, it was a requirement that employees in management positions had to go to Bible studies. When she asked why this was so, Owens told her that he was trying to run his Clubs using the Bible as his "training manual", and that he planned to impose work rules based on Biblical principles on all of his employees, not just those in management. He also told Ms. Carnahan that he had not wanted to hire her from the start because he had noticed that she was uncomfortable regarding matters of religion. She was then discharged.

22. Robin Carnahan's discharge disturbed many of the employees at the Normandale Sports and Health Club.

When Mike Edberg and Peter Brandt (associate membership directors) inquired with Creview as to the firing, Crevier told them that "it was the Lord that fired Robin". Crevier also told Cindy Witz, a receptionist, that Carnahan had been fired after he and Larson had prayed for guidance and were "told" by the Lord that if Robin said a certain thing, or things, that it was a sign that they should fire her. Edberg, Brandt and Witz are all "Born-Again" Christians who do not share the Respondents' evangelical fervor to proselytize or convert others to their beliefs, and who think that a person's religious beliefs and worship exercises should remain private.

*Beverly Larsen (Matha)*

23. Beverly Larsen (Matha)[2] was employed at the Normandale Sports and Health Club as an Associate Membership Director from July, 1976 to October 4, 1977. Prior to going to work there, Larsen had been a member of the Normandale Club for about three years. She became friends with Nancy Albertson, for whom she now works as an Administrative Assistant at Albertson's "Fitness Fantasia" Club in Colorado Springs, Colorado, and Albertson arranged for Larsen to interview for employment with Arthur Owens. Larsen's interview with Owens, except for two topics (her weight and whether she knew the "upstairs" operation of the Normandale Club) focused on personal matters dealing with her religion, her marriage, and her parents (who were divorced). She was required to answer questions such as whether she and her husband went to church and whether they prayed together. She also

[2]This Charging Party will be referred to herein by her name while in the Respondents' employ, Bev Larsen.

had to answer many questions regarding the breakup of her parents' marriage. After the interview, Owens approved the hiring of Larsen.

Bev Larsen was a good employee. On a couple of occasions, she received quarterly sales awards and was singled out as the top salesperson in all of the Respondents' Clubs on one occasion. After Nancy Albertson left the employ of Sports and Health, Larsen took over some of the initial training duties for the female staff that Albertson had performed. Larsen received no written performance evaluations because the Club had not initiated them while she worked there.

24. On October 3, 1977, Larsen, Syd Schugart and Mike Edberg went to Marc Crevier and Forest Larson to discuss the manner in which employees were being assigned "desk time". "Desk time" is the amount of time an associate membership director is assigned to the reception area, or front desk, and thus allowed to solicit potential memberships from persons who come to the Clubs for the first time without an appointment and have not requested assignment to a specific programmer. The amount of "desk time" received can greatly affect a programmer's income, which is based in large part on commissions earned through the sale of membership.

During the October 3 discussion, Crevier asked Larsen whether she was interested in management. She said she was, but also volunteered that she "didn't think (she) was probably Christian enough for Mr. Owens." She also said that she would be happy to work in management if Owens did not pressure and push her into being his kind of Christian (she is a Methodist). She made these remarks because Nancy Albertson had told her that Bible

studies and prayer were part of the mandatory managers' meetings, and this made her (Larsen) uncomfortable about accepting a management job.

25. As soon as Larsen arrived for work on October 4, 1977, Crevier called her into the Club's office and fired her. She had received no complaints or warnings regarding her job performance prior to that moment. The reason given for her termination was that she had a "bad attitude" and had been a "negative influence" on her co-employees, and had caused them to become dissatisfied with their jobs. Of these employees, only Faith Kiehl was called as a witness.

As to having a "negative attitude' 'about the Club, this meant to the Respondents that Larsen had a "spiritual problem". See Respondent's Exhibit 16B. Larsen was aware of Merle Fisher's Bible studies (See Finding of Fact 14), but did not attend them.

*Robert (Bob) Severin*

26. Bob Severin was employed as a programmer-associate membership director at the Midway and Apache Sports and Health Clubs for a total of 18 years between 1961 and 1983. He won several body building championships during that time. The break in his employment occurred in the mid-1970s, after he had gone through a traumatic divorce and tried some other jobs involving sales. He was re-hired by Jim Chapman in 1976 or 1977.

27. During his tenure at the Respondents' Clubs, Severin earned a reputation as an excellent programmer, especially for persons interested in body building. He was a successful salesman, having been cited as his club's "top salesman" on several occasions, and relied on his "word-

of-mouth" reputation among the members to obtain referrals, which generated most of his membership sales. Severin led the Club in sales during the last two years of his employment.

28. After Jim Chapman resigned in late 1981 and the operation of the Midway Club (where Severin was then employed) came under the direct control of Crevier and Larson and their manager, Jeff Penney, Severin received quarterly performance evaluations. These evaluations were generally favorable with respect to the sales and service aspects of the job with the last evaluation sheet indicating that Severin was somewhat reluctant to adhere to all of the newly-imposed "book requirements". See Complaint's Exhibit 6A-6D.

At each quarterly evaluation, and on many other occasions throughout 1982, Severin was asked by Owens, Larson, Crevier or Penney to attend the weekly Bible studies Penney was leading. Severin, a Roman Catholic who believes worship should be private or "in church" and kept out of the work place, declined to join on each occasion. The Respondents and Penney periodically mentioned to Severin that he could "improve" himself if he attended Bible studies.

29. At a staff meeting on January 3, 1983, Severin voiced the opinion that the Club's staff and management were not as motivated or showing the degree of enthusiasm that had been there under Jim Chapman. Jeff Penney reacted to this by calling Marc Crevier and the two agreed that Severin should be fired for his "bad attitude".

One hour after the staff meeting ended, Penney informed Severin that he was being terminated for having a

"bad attitude". Severin had no previous warning that his job was in jeopardy, although he was afraid of being discharged because of his consistent refusal to follow management's suggestion that he attend Bible studies. Penney also told Severin that his "beef" at the staff meeting had offended certain of Severin's co-workers, but when the Charging Party contacted the people Penney mentioned, they told Severin they had not been offended.

*Marilyn Crosby*

30. On November 2, 1982, Marilyn Crosby interviewed for employment with the Respondents. The interview was for an associate membership director's position, and was conducted by Marc Crevier at the Apache Sports and Health Club.

At the time of the interview, Crosby was employed as an assistant manager at a Grecian Health Spa establishment, where her duties included selling memberships and instructing members on matters of exercise and diet. She had been at Grecian for nine months and had earned a sales award there in July of 1982. On November 17, 1981 Crosby had received two awards from a previous employer, Spa Petite, one for sales achievement and a Certificate of Achievement for qualifying as a "full service instructress" in exercise, nutrition and relaxation.

31. During the course of the interview with Crevier, Crosby was asked personal questions only, such as whether she had any problems with her father, whether she had roommates and with whom she lived. Crosby answered all of the questions honestly, including informing Crevier that she was single and had begun to share a house in Ham Lake with her boyfriend in mid-October. As soon as this

last bit of information was given to Crevier he terminated the interview, telling Crosby that "we won't be able to hire you because you live with your boyfriend". He also told her that if she moved out, she could have the job.

*Steven C. (Steve) Bruhjell*

32. Steve Bruhjell was employed as an associate membership director at four of the Respondents' Clubs, with his longest term of service at Normandale, from June 18, 1973 through December 18, 1976. His club managers were Jim Chapman and Ira Rosen.

Bruhjell, who was hired by Jim Chapman, was asked no religious questions at the time of his initial employment. He was familiar with Club operations because he and his family had been members and worked out at Sports and Health Clubs for several years prior to his being hired. Mr. Bruhjell worked at the Apache Club for approximately his first month of employment with the Respondents and was transferred to Normandale after that Club opened for business in the summer of 1973. Shortly after he started working at Normandale, Bruhjell played an after-hours racquetball game with Arthur Owens and two of Owens' daughters. After the game Bruhjell and three Owens' got into a discussion on religion, during which Arthur Owens became strident and "tried to advance his beliefs on me (Bruhjell)", religious beliefs with which Bruhjell openly disagreed. While at Normandale, Bruhjell was invited, but declined to attend, Merle Fisher's Bible studies.

33. Bruhjell was an excellent employee and was the top sales person at the Normandale Club throughout

his period of employment. For 1976, the earliest year for which the Respondents still have sales performance charts, Bruhjell was ranked near the top in sales among employees at all Clubs.

34. In late 1974, after Bruhjell had been passed over for promotion, he was told by his then-roommate, Forest Larson, that he would not be promoted until he became a "Born-Again" Christian.

In mid-1975, Bruhjell transferred from the Normandale Club due to a personality conflict with its manager, Ira Rosen. His last 18 months in the Respondents' employ were spent working under Jim Chapman at the LaSalle and Midway Clubs. Chapmen liked Bruhjell and tried to get him promoted on several occasions, but Bruhjell was rejected on every occasion due to his religious beliefs, which were incompatible with those of management.

35. In late November or December of 1976, Steve Bruhjell decided to speak directly to Arthur Owens in an effort to find out if it was true that the only reason he had not been promoted to management was because of his religious beliefs. Owens admitted to him that his (Bruhjell's) religious beliefs were the only reason he had not been promoted. Shortly thereafter, Bruhjell resigned his employment because he felt he had no future in the Respondents' organization.

On May 26, 1978, Craig Dahlin, then manager of the Apache Sports and Health Club, and who is still a managerial employee of the Respondents, issued a letter "To Whom It May Concern". This letter, Complainant's Exhibit 26, states:

> Steve Bruhjell could not get into management at the Sports and Health Club because his religious beliefs

differ from that of the owner of the club. Therefore, he had no future as an employee here.

*Katherine Lamannsky*

36. Katherine Lamannsky was interviewed for a receptionist's position by Marc Crevier at the LaSalle Sports and Health Club on July 21, 1980. It was her understanding, prior to the interview, that the job would grow into an exercise instructor's position (called "assistant membership director" by the Respondents) as soon as she gained the necessary training. Ms. Lamannsky has an extensive background in dance (she was a ballet student for five years) and physical activity.

37. As Lamannsky's employment interview with Crevier progressed, he learned from the application that she was divorced. Crevier then began to probe about the details of why Lamannsky had gotten divorced, and she refused to tell him beyond the general statement that she and her husband "had grown apart". When Lamannsky continued to refuse to divulge details regarding her marriage and divorce, Crevier told her that the man was the head of the household and that if she had tried to work at it, the marriage would have stayed together. He reinforced his point with Bible passages, and again pressed for details regarding the breakup of the applicant's marriage. She persisted in her refusal to answer Crevier's inquiries along this line. After approximately 30 minutes, Crevier told Lamannsky that he did not feel she would be fit to work at Sports and Health and she thanked him and left. No specific reasons were given by Crevier, at that time, for Lamannsky's unfitness for employment.

*Linda Perkins*

38. In connection with the Respondents' buying of the Minnetonka Racquet and Swim Club and conversion of the building to the Tonka Sports and Health Club in 1983, Arthur Owens interviewed all former employees of the Racquet and Swim Club in an effort to see if any of them could be retained by Sports and Health. One of the employees interviewed in this process was Linda Perkins, who had been employed at the Racquet and Swim Club for two years, three months as a file clerk and child care supervisor. Owens interviewed her in the child care room at Minnetonka on May 10, 1983.

39. Although the Respondents did not intend to provide child care service at the Tonka Sports and Health Club and also had no employment then available for an office worker who could not type (as Perkins could not), Owens continued with the interview to see if there was something that could be done to keep Perkins employed at Sports and Health.

Owens then asked Perkins personal questions about her religious beliefs (whether she was a "Christian") and where she lived. Specifically, he asked her whether she lived with her parents, and she said no. Then, he asked if she lived with a girlfriend, and she said no. He then asked her whom she lived with, and Perkins told him she lived with her fiance.

When Owens was told that Perkins lived with her fiance, he terminated the interview. He told her that if he had known that beforehand, the conversation would not have gone on as long as it had. Owens closed the interview by saying: "Sorry. You realize that it is sinful, and it is

sinful to God, living out of wedlock . . . and since it is sinful to God, it is sinful to me".

*Joseph (Joe) Williams*

40. During the summer of 1980, Joe Williams, who had been a member of the Sports and Health Clubs, approached Marc Crevier at the LaSalle Court Club (where he usually worked out) about the possibility of employment with the Respondents' organization. Williams, a champion body builder, had recently quit his other employment to concentrate on some up-coming body building competitions, and wanted to work in an environment where he could continue his training. He was also in poor financial circumstances due to a recent divorce.

41. Although there was no current opening for an associate membership director, Crevier did discuss with Williams what was involved in the job, that the job description was based on Biblical principles and explained to Williams what the religious beliefs of the Sports and Health Clubs' management were. Specifically, he told Williams that he had to be a "reborn" Christian in order to be hired. Williams had no problem with this requirement. Crevier also said that Williams would have to go to weekly Bible studies. This led to a discussion which upset Williams, who then decided not to fill out an application for employment, although Crevier offered him the opportunity to do so for consideration when an opening occurred in the future. Williams decided not to continue with the application process because he did not want to make Crevier any more upset and, thus, possibly jeopardize his membership.

42. During the several weeks following the employment "interview" described in the preceding finding, Joe

Williams' membership in the Sports and Health Clubs was terminated. The termination resulted from a continuing dispute between Williams and Club managemnt over whether Williams' dues were current and over his behavior in the Club lobby. On a couple of occasions, Williams got into loud shouting matches with Crevier and other Sports and Health personnel who refused to admit him until he paid his dues. However, Williams did pay up some of his arrearages during this period—of $57.30 on July 31, 1980 and $20.66 on October 7, 1980, as well as $10.00 on October 9, 1980. According to Complainant's Exhibits 17 through 20, these payments made Williams current through October, 1980.

It is the Respondents' policy to refer anyone who falls three months behind in dues payments to the North Star Collections Agency. As of June, 1980, Williams was over five months behind in his dues. but no referral was made to North Star Collections. It is the further policy of the Respondents to require any member who has been referred to the collection agency, or "close to such a referral", to pay a year's dues in advance as well as to get current before they can continue to use the Clubs. In Williams' case, Owens decided, after discussing the situation with Joe, to allow him to sign a note for the one year of dues in advance, without requiring cash "up front", and made his continuing membership contingent on signing the note paying up his past dues and showing Crevier that he (Williams) could behave in the Clubs. After Williams refused to sign the note upon presentment, his membership was terminated.

*Miriam Cameron and Michael Ormond*

43. Charging Parties Cameron and Ormond were married to each other in November 1980. They were both single when they joined the Sports and Health Club in December 1978 and paid $350 each for initial membership. They generally used the LaSalle Court facility. Cameron and Ormond are Jewish. They noticed no religious emphasis or proselytizing at the Club during the first 18 months of their memberships.

44. In approximately mid-1980, after Marc Crevier had assumed the day-to-day management of the LaSalle Sports and Health Club, Cameron and Ormond began to notice an increase in the proliferation of fundamentalist Christian literature and "propaganda" at the Club. Specifically, literature they perceived to be "ultra-conservative" or "right-wing" appeared in the lounge, and three large signs (5 feet x 3 feet) were posted where all members could see them. One sign pointed out four "sources of happiness", using Bible passages to explain. A second sign alleged that God dislikes homosexuals and belittled gay people. Cameron and Ormond were offended by the newly-placed literature in the lounge and by both of the previously-described signs. The third sign, the one found most offensive by Cameron and Ormond and which caused them to complain and ask for its removal, was a sign placed at the entrance to the exercise room which compared "The Truth" to "False Cults".

The "Truth" v. "False Cults" sign was a graph depicting the religious views of the Club's management on certain doctrinal questions ("The Truth"), other religions, including Judaism ("False Cults"). Other "False Cults" whose purported views were compared to "The Truth" es-

poused by the Respondents included Christian Science, Jehovah's Witnesses and Mormonism. Cameron and Ormond complained to the Club's receptionist about this sign, and asked for it to be taken down, but it was not removed during the time they remained as members.

45. In August of 1980, Frances Raynes (Cameron's exercise instructor) and Crevier learned that Cameron had published a spiritual book entitled *Hello, I'm God and I'm Here to Help You.* Shortly thereafter, Raynes and Crevier discussed Cameron's book and her religious views with her in the women's office at LaSalle with a view to deciding whether notice of the book should appear in Sports and Health's membership newsletter. Crevier did most of the talking. He belittled Cameron's view and lectured her on fundamentalist Christian doctrine for what seemed (to Cameron, who had just finished a workout and was tired) a long time. Cameron was emotionally shaken by this experience. Crevier told Cameron that notice of her book would not appear in the Clubs' newsletter (sent to all members) because the book refused to condemn homosexuality and espoused that there was more than one way to reach God. Ormond, Cameron's fiance at the time, finally arrived and terminated the discussion. At that time, Cameron was visibly shaken and Crevier was talking in a loud voice, leaning across the table, and had a stern expression on his face.

46. After the book discussion incident, and with the Club's continuing refusal to remove the "Truth-False Cults" sign, Cameron's and Ormond's use of the Sports and Health Clubs dropped off to the point when, in January, 1981, they decided to terminate their memberships.

On February 12, 1981, Ormond wrote to Owens and re-

quested a refund of the $700 he and Cameron had collectively paid for initial membership. See Complainant's Exhibit 21. Ormond wrote that he and his wife had paid the fee on the understanding that they were enrolling in an "exercise gym" but that the increasing amount of "evangelistic propaganda" to which they became subjected during the previous year had materially altered the terms and conditions of their membership. The letter continues:

> "Because our initial deposit was solicited by your business without advance warning of what I must deem to be an intolerable anti-Semitic overtone in the management of the Club, I believe we are entirely justified in our request that our initial membership fees be refunded in full."

On February 19, 1981, the Clubs' Credit Department responded to Ormond's letter with a refusal to pay any portion of the requested refund(s). The letter to Ormond (Complainant's Ex. 22) includes the following statement:

> "The exercise facilities to which you subscribed are available to everyone who buys a membership. We don't limit to a select group."

*Jeffrey Peters*

47. Jeffrey S. Peters is one of the Charging Parties in this case about whom the Complainant listed allegations in her final amended Complaint, filed with the Hearing Examiner in this matter on July 5, 1983. Counts 53-56 allege that the Respondents violated Minn. Stat. §§ 363.03, subd. 3 by denying Peters, a member in good standing, the full and equal enjoyment of the goods, services, facili-

ties, privileges, advantages and accommodations of Sports and Health because of religion in approximately November, 1980. The Complainant also alleges that Peters was harassed on the basis of religion between approximately January, 1980 and November, 1980.

Peters was living in Germany throughout the conduct of the hearing in this matter. At the hearing, counsel for the Complainant made an oral Motion to dismiss without prejudice that portion of the amended Complaint respecting Mr. Peters. Respondents' counsel opposed the motion, arguing for a dismissal with prejudice. After hearing arguments for both sides, the Hearing Examiner granted the Complainant's Motion and dismissed without prejudice those portions of the Complaint respecting Jeffrey Peters.

Based upon the above Findings of Fact, the Hearing Examiner makes the following:

## CONCLUSIONS OF LAW

1. That the Complainant gave proper Notice of the Hearing in this matter and has fulfilled all relevant substantive and procedural requirements of law and rule.

2. That the Hearing Examiner has jurisdiction herein and authority to take the action ordered pursuant to Minn. Stat. §§ 363.071, subd. 2 and 14.50 (1982).

3. That the Complaint issued by the Complainant in this matter was issued pursuant to Minn. Stat. § 363.06.

4. That the Respondents are employers within the meaning of Minn. Stat. § 363.01. subd. 15.

5. That the Respondents' Clubs are places of public accommodation within the meaning of Minn. Stat. § 363.01, subd. 18.

6. That those portions of the Complaint respecting Jeffrey Peters should be dismissed without prejudice.

7. That the Respondents violated Minn. Stat. § 363.-03, subd. 1(2) (b) by discharging Robin Carnahan because of religion.

8. That the Respondents violated Minn. Stat. § 363.-03, subd. 1(2) (c) by discriminating against Robin Carnahan because of religion with respect to the upgrading of her employment.

9. That the Respondents violated Minn. Stat. § 363.-03, subd. 1(2) (b) by discharging Beverly Larsen (Matha) because of religion.

10. That the Respondents violated Minn. Stat. § 363-03, subd. 1(2) (c) by discriminating against Beverly Larsen (Matha) because of religion with respect to the upgrading of her employment.

11. That the Respondents violated Minn. Stat § 363.-03, subd. 1(2)(b) by discharging Robert Severin because of religion.

12. That the Respondents violated Minn. Stat. § 363.-03, subd. 1(2) (a) by refusing to hire Marilyn Crosby because of marital status.

13. That the Respondents violated Minn. Stat. § 363.03, subd. 1(2) (c) by discriminationg against Steven Bruhjell because of religion with respect to the upgrading of his employment.

14. That the Respondents violated Minn Stat § 363.-03, subd. 1(2)(a) by refusing to hire Katherine Lamannsky because of marital status.

15. That the Respondents violated Minn Stat. § 363.-03, subd. 1(2) (a) by refusing to hire Linda Perkins because of marital status.

16. That the Respondents violated Minn. Stat. § 363.-03, subd. 1(4) (a) by requiring Joseph Williams to furnish information pertaining to religion before being employed.

17. That the Respondents did not deny Joseph Williams the full and equal enjoyment of its services and facilities as a place of public accommodation because of religion within the meaning of Minn. Stat. § 363.03, subd. 3.

18. That the Respondents denied Miriam Cameron the full and equal enjoyment of its services and facilities as a place of public accommodation because of religion within the meaning of Minn. Stat. § 363.03, subd. 3.

19. That the Respondents did not deny Michael Ormond the full and equal enjoyment of its services and facilities as a place of public accommodation because of religion within the meaning of Minn. Stat. § 363.03, subd. 3.

20. That with respect to the violations of Minn. Stat. § 363.03 noted above at Conclusions 7 through 16 and 18, Respondents Crevier, Larson and Owens did not aid and abet Respondent Sports and Health Club, Inc., within the meaning of Minn. Stat. § 363.03. subd. 6.

21. That the Respondents' practices of not hiring or promoting young unmarried women who live away from home without the permission of their parents, young unmarried women who do not have their parents' permission to work, and married women who do not have their husbands' permission to work, because they have such status, violate Minn. Stat. § 363.03, subd. 1(2).

22. That the Respondents' practices of inquiring into whether a woman has the permission of her parents or husband to live away from home or seek work violate Minn. Stat. § 363.03, subd. 1(4) (a).

23. That with respect to the violations of Minn. Stat.

§ 363.03, noted above at Conclusions 7 through 16, 21 and 22, Respondents have not proven that their unfair employment practices are based on bona fide occupational qualifications regarding religion, marital status or sex.

24. That the Respondent, Sports and Health Club, Inc., is not a religious corporation entitled to an exemption under Minn. Stat. § 363.02, subd. 1(2) from the provisions of Minn. Stat. § 363.03, subd. 1 proscribing unfair discriminatory practices in employment.

25. That application of the provisions of the Minnesota Human Rights Act to the Respondents does not constitute an establishment of religion within the meaning of the First and Fourteenth Amendments of the United States Constitution or Article I, Section 16 of the Minnesota Constitution.

26. That application of the provisions of the Minnesota Human Rights Act to the Respondents is not an impermissible or unconstitutional infringement of the rights individual Respondents Crevier, Larson or Owens have to free speech, freedom of association or the free exercise of their religion under the First and Fourteenth Amendments of the United States Constitution or Article I, Section 16 of the Minnesota Constitution.

Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

## ORDERS

IT IS HEREBY ORDERED that the Respondents pay compensatory damages to Charging Parties Robin Carnahan, Beverly Larsen (Matha), Robert Severin, Marilyn Crosby, Steven Bruhjell, Katherine Lamannsky,

Linda Perkins and Joseph Williams, such damages to be determined in a subsequent proceeding between the parties, pursuant to due notice; and

IT IS FURTHER ORDERED that the Respondents pay compensatory damages to Charging Party Miriam Cameron in the amount of $230, plus statutory interest accrued after February 19, 1981, the date on which Respondents refused refund to the Charging Party of her initial membership fee; and

IT IS FURTHER ORDERED that the Respondents pay, as part of the compensatory damages ordered above, damages for mental anguish or suffering to Charging Parties Robert Severin, Marilyn Crosby and Linda Perkins, with damages to be determined in a subsequent proceeding between the parties, pursuant to due notice; and

IT IS FURTHER ORDERED that those portions of the Complaint alleging violations of Minn. Stat. § 363.03, subd. 3 respecting Michael Ormond and Joseph Williams be dismissed; and

IT IS FURTHER ORDERED that those portions of the Complaint alleging violation of Minn. Stat. § 363.03 respecting Jeffrey Peters be DISMISSED WITHOUT PREJUDICE; and

IT IS FURTHER ORDERED that all counts of the Complaint in this matter alleging that Respondents Arthur Owens, Marc Crevier and Forest Larson did aid and abet Respondent Sports and Health Club, Inc., in violation of Minn. Stat. § 363.03, subds. 1(2), 1(4) and 3, within the meaning of Minn. Stat. § 363.03, subd. 6 be DISMISSED; and

IT IS FURTHER ORDERED that the Respondents cease and desist and are hereby enjoined from:

(1) Discriminating against any person on the basis of religion, including:

(a) refusal to hire any person because of that person's religious beliefs or practices;

(b) refusal to hire any person because that person has stated an objection to the religious beliefs or practices of the Respondents' management or other employees;

(c) inquiry into the religious beliefs or practices of any prospective employee;

(d) inquiry into the religious beliefs or practices of any employee;

(e) taking any adverse action against any employee because of that employee's religious beliefs or practices;

(f) denial of a supervisory or management position to any person based upon that person's religious beliefs or practices.

(g) requiring, soliciting or suggesting the participation in Bible studies or other religious exercises or practices on the part of any employee;

(h) taking adverse action against any employee who does not participate in Bible studies or any other religious exercises or practices because of that non-participation;

(i) taking any adverse action against any employee who objects to the religious practices or exercises of management or of any other employees because of their objection(s) thereto; and

(2) Discriminating against any person on the basis of marital status, including:

(a) refusal to hire any person because of marital status;

(b) requiring any prospective employee to furnish information pertaining to marital status;

(c) taking adverse action against any employee because of marital status;

(d) denial of a supervisory or management position to any person based upon that person's marital status; and

(3) Discriminating against any person on the basis of sex, including:

(a) refusal to hire any young, unmarried women who live away from home without their parents' consent because of that lack of consent;

(b) inquiry of any young, unmarried woman as to whether she lives away from home and, if she does, whether she has her parents' consent;

(c) refusal to hire any young, unmarried woman who desires to work and does not have the consent of her parents, because of that lack of consent;

(d) inquiry of any young, unmarried woman as to whether she has her parents' consent to work;

(e) refusal to hire any married woman who desires to work and does not have her husband's consent, because of that lack of consent;

(f) inquiry of any married woman as to whether she has her husband's consent to work; and

(4) Denial to any person of the full and equal enjoyment of its services, facilities and privileges as a public accommodation, to wit:

(a) harassment or ridicule of any member, guest or other user of its services and facilities because of religion.

Dated this 26th day of April, 1984.

/s/ Richard C. Luis
Hearing Examiner

Reported: Court Reporter - Summit Court Reporters
Karen Toughill, Lynn Peters,
William Roemer
and Debra Schmidt.

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MEMORANDUM

STATUTORY CHARGES - EMPLOYMENT

Minn. Stat. § 363.03, Subdivision 1 prohibits discrimination in employment on account of religion, marital status and sex. It also prohibits pre-employment inquiry pertaining to such subjects. The Minnesota Supreme Court, in determining what sort of actions constitute prohibited discriminatory practices under the Human Rights Act and in dictating how such discrimination must be proven, has followed the approach of the federal courts in interpreting a similar statute, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e. *et seq.*, and has decided that Court decisions under Title VII are applicable to similar actions under State law. *See, Danz. v. Jones,* 263 N.W.2d 395, (Minn. 1978) and *Hubbard v. United Press International, Inc.,* 330 N.W.2d 428 (Minn. 1983).

A three-part analysis was set out by the United States Supreme Court in the case of *McDonnell-Douglas Cor-*

*poration v. Green*, 411 U.S. 792 (1973), describing the shifting burdens of production and proof in discrimination cases, and this analysis has been most recently refined by the Court in the case of *Texas Department of Community v. Burdine*, 450 U.S. 248 (1981). The requirements are: the Plaintiff must establish a *prima facie* case of discrimination; (2) the Defendant must rebut the *prima facie* showing by articulating some legitimate, non-discriminatory reason for the employment action; and (3) the Plaintiff must then show, by a preponderance of the evidence, that the reasons stated are a pretext for actual discrimination.

Under the Minnesota Human Rights Act, a member of a protected class who alleges that (s)he was treated differently from other persons because of membership in that protected class carries the initial burden of proof by establishing a *prima facie* case by showing (1) (s)he is a member of a protected class; (2) (s)he was qualified for the job; (3) that an adverse employment action was taken against him/her; and (4) the employer assigned non-members of the protected class(es) to do the same work. *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428 (Minn. 1983).

With respect to the Charging Parties in this matter, the Respondents have advanced legitimate non-discriminatory reasons for their employment actions or argue that they have taken action that they believe is protected by the United States and Minnesota Constitutions because such actions come within the free exercise of their religion. For each such action, the Complainant has introduced evidence attempting to show pretext or argued that the Respondents' actions are not entitled to constitutional protection. The allegations of discrimination in employment regarding each Charging Party will be considered below.

Before examing the charges, however, it is appropriate to discuss what the Complainant has to establish in order prove a *prima facie* case of discriminatory treatment. The formula laid out by the Minnesota Supreme Court's dictum in *Hubbbard v. United Press International, Inc., supra,* is based upon a Fifth Circuit United States Court of Appeals Ruling in *Marks v. Prattco, Inc.,* 607 F.2d 1153 (1979). The requirement in that case was that the plaintiff must show: (1) membership in the protected class; (2) qualifications for the job from which discharged; (3) discharge; and (4) assignment by the employer of a non-member of the protected class to do the same work. 330 N.W. 2d at 442.

A rigid application of the *Hubbard-Prattco* analysis would leave the Complainant short of establishing a *prima facie* case with respect to some of the charges because, in some cases, the Charging Parties herein were replaced by members of the same protected class, or, in some instances, the record does not reveal who replaced them. The Hearing Examiner believes that a departure from that formula is correct in this case, however, because the formula is dicta only and, therefore, not a binding pronouncement of the Minnesota Supreme Court, and because the Fifth Circuit itself has departed from the *Prattco* test in a subsequent ruling of its own. In *Byrd v. Roadway Express, Inc.,* 687 F.2d 85 (1982), the Fifth Circuit Court of Appeals overturned a District Court judgment in favor of an employer who established that the complaining black employee was replaced by another black employee. The Court noted "but that Byrd was replaced by a black does not necessarily negate the possibility that his treatment and discharge were motivated by racial discrimination". As the Court of

Appeals observed, while a *prima facie* case could be established by a plaintiff proving the four elements of the *Prattco* test, uncontroverted proof of the "converse" of the fourth element, replacement by a person of the same protected class, does not conclusively eliminate the possibility that discrimination was the employer's motivation for a discharge:

> "But as this Court and the Supreme Court have repeatedly pointed out, no single formulation of the *prima facie* evidence test may fairly be expected to capture the many guises in which discrimination may appear . . . The focus of the inquiry may not be obscured by the blind recitation of a litany. The aim of the *Prattco* test, and particularly of its fourth element, is to identify actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under the Act. 687 F.2d at 86. (Citations omitted).

*See also, Jones v. Western Geophysical Company,* 29 F.E.P. Cases 1117 (5th Cir. 1982), which quotes from the decision of the United States Supreme Court in *Texas Department of Community Affairs v. Burdine, supra,* ". . . the burden to establish a prima facie case is not onerous. All that the plaintiff need do is prove by a preponderance of the evidence that he was discharged from a position for which he was qualified under circumstances which give rise to an inference of unlawful discrimination . . . proof that the employer replaced the fired minority employee with a non-minority employee is not the *only* way to create such an inference." 29 F.E.P. Cases at 1121 (Emphasis in original).

The United States Court of Appeals for the Eighth Circuit has also departed from the *Hubbard-Prattco* test in *Osborne v. Clelland,* 620 F.2d 195 (1980), where it was held that the employee proved a *prima facie* case of discriminatory discharge by showing: (1) membership in a protected class; (2) demonstrable capability of performing employment duties; (3) discharge by the employer; and (4) that the employer sought people with similar qualifications to fill the vacated position. See also, *White v. Ed Miller and Sons, Inc.,* 457 F.Supp. 148 (Dist. Neb. 1978) and *Lee v. Russell County Board of Education,* 684 F.2d 769 (11th Cir. 1982), which indicate that a *prima facie* case of discriminatory discharge can be established with evidence that the Complainant adequately performed his job, and (1) was replaced by another person outside the protected class, or (2) was singled out for discharge while others who were similarly situated, but who were not of that complainant's protected class, were retained.

In summary, the Hearing Examiner is persuaded that the *Hubbard* dicta is one way to establish a *prima facie* case in a matter such as this, but that the Complainant has made that establishment here on behalf of some of the Charging Parties for slightly different reasons. The unique sets of facts involved with respect to each Charging Party create inferences of discrimination (based on religion and/or marital status) under applicable law, as cited above, so *prima facie* cases of illegal discrimination based on religion and/or marital status have been established with respect to the employment actions taken against each of them.

With respect to the Charging Parties in this matter, the Respondents have advanced what they believe to be legi-

timate non-discriminatory reasons for the employment actions or have taken action that they believe is protected by the United States and Minnesota Constitutions because they come within the free exercise of their religion. For each such action, the Complainant has introduced evidence attempting to show pretext or argued that the Respondents' actions are not entitled to constitutional protection. That an employer's advanced reasons for discharging an employee are merely pretext can be established by two basic approaches—(1) *directly*, by persuading the finder of fact that a discriminatory reason more likely initiated the employer's actions or (2) *indirectly*, by showing that the employer's proffered explanation is unworthy of credence. See, *Texas Department of Community Affairs v. Burdine, supra,* at 255 and *Lamb v. Village of Bagley,* 310 N.W. 2d 508, 510 (Minn 1981). The allegations of discrimination in employment regarding each Charging Party will be considered below.

*Robin Carnahan*

Ms. Carnahan is properly identified as a member of a protected class within the context of this action because she is not, and never has been a "Born-Again" Christian. Given the Respondents' policy that only such persons can be elevated to management, and the fact that she revealed the religious opinions which cost her her employment in the context of being considered for a manager's position, the Complainant has established a *prima facie* case of discrimination against her with respect to the upgrading of her employment. A *prima facie* case of religious discrimination against Carnahan with respect to her discharge

has been made by the State as well, since she lost her job for being what the Respondents call "antagonistic to the Gospel", and the Respondents admit that they will not retain such persons in their employ. The standards used by the Respondents to decide whether an employee is "antagnostic to the Gospel" in the work place are dictated by their religious beliefs. The Respondents have placed persons like Carnahan in a class of persons against whom the Respondents take action (such as discharge) based on those beliefs.

The other elements of a *pr'ma facie* case have been established as well for this Charging Party. As to her performance as an associate membership director, Respondent Owens admitted to Carnahan that she did a good job. Her performance evaluations, part of the record, are very good. The element of whether she had demonstrated the requisite ability to be a supervisor is satisfied by the credible testimony from Carnahan to the effect that Crevier and Larsen told her, at an employment evaluation session, that she was being considered for management. As to whether the employer sought others with Carnahan's qualifications to fill the vacancy created by her departure, it is the undisputed testimony of the individual Respondents that Sports and Health has a large and frequent turnover of associate membership directors and is "always looking for qualified help".

The Respondents rebutted the testimony of Carnahan and witnesses who supported her by pointing out that she was occasionally late for work or absent from required meetings, did work for her husband's business on the Respondents' time, and violated work rules by once drinking on the premises and borrowing from the T-shirt fund. The

evidence shows that those listed reasons for Carnahan's discharge are pretextual. While Crevier may have (as he testified) pointed out the above-listed problems to Carnahan as they occurred and at the May 30, 1978, meeting when he discharged her, the Hearing Examiner does not believe that he decided to fire her for those reasons. Rather, he believes Crevier told her that he would have to dismiss her (unless she convinced Owens to keep her on) because of his reaction to the critical comments Carnahan made regarding the religious practices, such as Bible studies for managers, of the Respondents. This is supported by the testimony of witnesses Brandt, Edberg and Witz to the effect that Crevier subsequently admitted to them that "God fired Robin".

Crevier's testimony that he discharged Carnahan for having a "bad attitude" is also revealing in this regard because, after Carnahan had told him her opinion on the religious atmosphere and practices at the Club, Crevier told her that if that was her attitude, he could no longer keep her in his employ. The Hearing Examiner believes Carnahan's account, that it was not until the conversation progressed to the point of Carnahan's offering of her religious opinions that Crevier told her that her employment status was in imminent jeopardy. Crevier's recollection is not inconsistent with Carnahan's. The fact that Carnahan's religious opinions were revealed in the context of discussing the prospect of whether she could be a manager within the organization implies that the Charging Party was still under consideration for such a job until she revealed her views on the Respondents' religious practices.

Carnahan's subsequent meeting with Owens was strictly a religious-oriented discussion in which the President

told her that even though she had done a good job, he intended to advance to management only persons who shared his religious convictions. This is further evidence that Ms. Carnahan was otherwise qualified for management but was denied such upgrading of her employment because of religion. He also told Carnahan that he intended to impose work rules based on "Born-Again" Christian principles on all of his employees, and that he had suspected, from the time of her initial interview with him for employment, that she would not fit in to such an atmosphere. He then confirmed her discharge. Furthermore, it is undisputed that Carnahan was a popular employee who may have influenced others. It is reasonable to infer from these circumstances that the business reasons offered by Crevier and Owens for Carnahan's discharge were not the real reasons for the adverse employment actions taken against her. The Hearing Examiner concludes that both of the alternative methods of showing pretext under the *Burdine* and *Lamb* cases have been satisfied—pretext has been established directly by a showing that a discriminatory basis more likely initiated the employer's actions and the employer's explanation is not credible (an indirect showing of pretext). Therefore, the Complainant has proven, by a preponderance of the evidence, that Robin Carnahan was discharged because of religion and discriminated against with the respect to the upgrading of her employment because of religion within the meaning of Minn. Stat. § 363.03, subd. 1(2).

*Beverly Larsen (Matha)*

The Complainant has established *prima facie* cases that Beverly Larsen was the victim of unfair discriminatory

practices based on religion with respect to the upgrading of her employment, and that she was unfairly discriminated against because of religion when she was discharged from her employment. This element of proof has been met by factual showings similar to those involving Robin Carnahan. Larsen is a member of the "class" of persons existing in the employment of the Respondents who were deemed "antagnostic to the Gospel", a distinction with a religious basis. Since the class is based on the religious beliefs, attitudes and practices of its members (persons whose religious beliefs, attitudes and practices were viewed by the Respondents to be incompatible with theirs), it is protected by the Human Rights Act.

There is no dispute that Ms. Larsen was competent as an associate membership director. Her sales record was good and she was never warned that her job was in jeopardy until the day she was discharged. Like Carnahan, she was popular with and influential on her co-workers. She had also assumed some of the training duties of Nancy Albertson, the woman co-manager whose position had been vacant since the fall of 1976. On October 3, 1977, Larsen made remarks critical of Owens' practices of requiring that Bible studies be part of management meetings, saying that she probably would not be "Christian" enough for him to be a manager. These remarks followed an inquiry by Crevier as to whether she was interested in management, and Larsen's acknowledgment that she was. These circumstances create a reasonable inference that Larsen was qualified for a management post. Her discharge on October 4, 1977, of course, removed her from such consideration. The final element of a *prima facie* case exists, as it does with respect to all the Charging

Parties, because the Respondents have admitted that they have a rapid turnover in personnel and are always looking for qualified people. The fact that Carnahan was asked about management some eight months after Larsen's discharge further establishes that the Respondents continued to seek qualified potential managers.

Respondent Crevier told Larsen that she was being discharged for being a "negative influence" in the Club. He specifically accused her of creating unhappiness among three junior staff members. He also testified that Larsen was never considered for management because she did not get along well enough with the staff, had difficulty with the clerical responsibilities of the job, and did not always "program" the members properly.

It is the Hearing Examiner's conclusion that the Complainant has successfully rebutted the employer's business-related reasons for Larsen's non-promotion and discharge and shown them to be pretextual. Ms. Larsen's testimony that she told Crevier, on the day before she was discharged, that she was probably not "Christian" enough for Mr. Owens to be considered for management and that she would be happy to work in management if Mr. Owens did not pressure or push her into being his kind of Christian, was never rebutted. This establishes two things—(1) that Larsen was a candidate for elevation to management, and (2) that she was similarly fired after voicing a religious opinion. It is, therefore, concluded that the Complainant has established directly (under the *Burdine-Lamb* standard) that an illegal discriminatory reason, religion, was the more likely basis than any other for the Respondents' actions (denial of her promotion and discharge). Under applicable law, pretext has been proven by a preponderance of the evidence.

Another establishment of pretext (an indirect showing under *Burdine* and *Lamb)* was made by the testimony of Faith Kiehl, one of the women (along with Debra Watermoellen and Ann Stewart) that Crevier alleges had been "negatively influenced" by Larsen. Kiehl's testimony was that Ms. Larsen helped and encouraged her, never caused her any trouble and that Kiehl never told management, or anyone else, that the Charging Party had been a "negative influence" on her. In addition, Kiehl's testimony also establishes that Debra Watermoellen, with whom Kiehl worked closely, had never, to Kiehl's knowledge complaintd about Bev Larsen or told Kiehl that Larsen had been mean to her. Although Marc Crevier's testimony on this general subject tends to contradict Kiehl's, the Hearing Examiner found Faith Kiehl to be an entirely credible witness. Her testimony casts sufficient doubt on the Respondents' proffered reasons for the action they took against the Charging Party to further prove pretext by a preponderance of the evidence. The Complainant has proven that Beverly Larson (Matha) was discharged because of religion and discriminated against with respect to the upgrading of her exployment within the meaning of Minn Stat. § 363.03, subd. 1(2).

*Robert (B) Severin*

Bob Severin is not now, and never has been a "Born-Again" Christian. A Catholic who believes religious activities should be kept out of the work place. Severin was pressured by the Respondents to attend Bible studies throughout the entire period of time (about one year) after Crevier and Larson, and Jeff Penney, their Club manager, took direct charge of the Midway Sports and Health Club

from Jim Chapman. He always declined to participate in the Bible studies. His non-attendance at those studies and belief that people should not engage in religious practices at work places Severin in a class of employees whose religious beliefs and practices are different from those of the Respondents, a class protected from discrimination based on religion within the meaning of Minn. Stat. § 363.03, subd. 1(2). His 18-year tenure with Sports and Health, during which he was successful at sales and developed a reputation as an excellent body-building instructor, is ample evidence of his capability to perform as an associate membership director. He was discharged from employment, and, since the employer is always looking for persons qualified to be associate membership directors, a *prima facie* case of discrimination based on religion has been established.

Several weeks after receiving a generally favorable employment evaluation from the Respondents, Mr. Severin was discharged within one hour of stating, at a staff meeting with Club manager Jeff Penney present, that the motivation and enthusiasm showed in the Club when Jim Chapman was manager seemed to be lacking. The Respondents' proffered reasons for discharge were that Severin was lacking in enthusiasm, had been unwilling to conform to the "book work" system imposed by management after Chapman departed, and that he, as a senior employee, was setting a bad example for the rest of the staff. The Hearing Examiner has concluded that these reasons are pretextual.

Severin's unrebutted testimony was that Jeff Penney fired him after Penney had called Marc Crevier and discussed what to do about Severin's remarks in the staff meeting. There is no evidence that Severin had been

warned before that time that his job was in jeopardy and a "lack of enthusiasm" or a repeated tendency to ignore recordkeeping duties are matters that require observation over a period of time. Examination of Severin's last job performance review shows that Jeff Penney may have observed these qualities in Severin, but this, standing alone, fails to prove that Severin was informed that his employment status was precarious. It is reasonable to believe that an employee with 18 years of seniority in an organization would have been told if he was in danger of losing his job because of his work habits, and would have been given a chance to change them, but the record fails to establish that such was the case regarding this Charging Party. Although Severin acknowledged on cross-examination that no one in management ever directly told him that he would lose his job if he did not attend Bible studies, or told him that he had lost his job because of non-attendance at them, the Hearing Examiner is persuaded that the fact that Owens, Crevier, Larson and Penney had been asking Severin to go to Bible studies throughout the year after they took over the direction of the Midway management establishes pretext by a preponderance of the evidence. This is so because he is persuaded that Severin's religious views more likely initiated the Respondents' decision to discharge Severin than any of the business-related reasons offered for the termination. Therefore, Mr. Severin was discharged in violation of Minn. Stat. § 363.03, subd. 1(2) (b), which prohibits discharge because of religion.

*Marilyn Crosby*

Marilyn Crosby's employment interview was terminated by Marc Crevier when she revealed to him that she was

an unmarried woman who lived with her boyfriend, a member of the opposite sex. Since Crosby was not hired, is a member of a protected class (single persons), was indisputably capable, due to her record at Spa Petite and Grecian Health Spas, of performing the job of associate membership director and the Respondents continued to seek qualified persons to fill their vacancies, the Complainant has established a *prima facie* case of discrimination because of marital status under the Act. Moreover, the Charging Party's unrebutted testimony that Crevier told her she could have the job if she moved out of the living arrangement with her boyfriend is direct proof of discrimination because of marital status.

The Respondents' reason for not hiring Crosby, or any unmarried woman who lives with a member of the opposite sex, is their refusal to support persons who violate Minn. Stat. § 609.34, which reads:

> "When any man and single woman have sexual intercourse with each other, each is guilty of fornication which is a misdemeanor."

The Hearing Examiner, for reasons stated below, does not consider advancement of this defense to be a showing on the part of the Respondents of a legitimate non-discriminatory reason for not hiring Marilyn Crosby.

The record establishes that Ms. Crosby, a single woman, lived with her boyfriend at the time of the employment interview in question, but fails to establish that she is a fornicator. This is because there is no evidence that she has had sexual intercourse with a man to whom she is not married, or of her sexual experience at all. The Hearing Examiner took notice on the record of the fact that many

persons in today's society live with persons of the opposite sex but do not engage in sexual relations. However, the inference is strong that a young woman who moves into a dwelling with her "boyfriend" is engaging in sexual relations with him, so the Hearing Examiner has not relied on the fact that the record does not technically establish fornication to resolve this charge.

The proffered reason is not "legitimate" in Minnesota within the meaning and intent of the Human Rights Act and the cases interpreting it because the Legislature did not intend to make an exception excluding fornicators from protection against discrimination in employment because of their marital status. It is so reasoned because Minn. Stat. § 609.34 was last amended in 1971. The provisions of Minn. Stat. § 363.03, subd. 1, prohibiting discrimination in employment based on marital status were not enacted until 1973. The Legislature made no exception denying protection of the Human Rights Act to single persons engaged in fornication when it passed the law to prohibit discrimination in employment based on marital status, and it has not done so since. The inference is that the Legislature intends the fact that a single job applicant is guilty of fornication to be immaterial to the question of whether she has been the victim of illegal discrimination in employment because of marital status.

Because a woman's marital status is relevant to whether she can be guilty of fornication (she must be single), the law making fornication a crime is irreconcilable with the subsequently passed law prohibiting employment discrimination based on marital status. That is, the Human Rights Act may be viewed as requiring employers to "subsidize",

through employment, persons who are engaged in criminal behavior.

Minn. Stat. § 645.26, subd. 4 reads:

> "When the provisions of two or more laws passed at different sessions of the legislature are irreconcilable, the law latest in date of final enactment shall prevail."

Under the above-quoted law, the Human Rights Act, provisions making discrimination based on marital status illegal must prevail over an employer's unwillingness to "subsidize" fornication.

The Respondents argue that their refusal to hire or retain persons they believe or know to be fornicators is constitutionally protected as a free exercise of their religion. The general "free exercise" defense will be discussed under a later heading in this Memorandum. However, for the reasons stated under this subheading, the Complainant has proved by a preponderance of the evidence that the Respondents violated Minn. Stat. § 363.03, subd. 1(2) (a) by refusing to hire Marilyn Crosby because of marital status.

*Linda Perkins*

Ms. Perkins' charge is similar to Marilyn Crosby's. She is single, has demonstrated capability to work in the Respondents' organization because of her two years as a child-care supervisor for a similar business, she was not hired, and the Respondent continued to seek qualified persons to perform the work Perkins sought after refusing to employ her. The final element of a *prima facie* case has been inferred from the unrebutted testimony of Perk-

ins to the effect that, although Mr. Owens told her the Respondents were not intending to employ child-care people at the Tonka Club, he continued to interview her in order to ascertain whether she was qualified to work elsewhere in the Company and/or in some other capacity. The above-noted facts establish a *prima facie* case that Perkins was the victim of illegal discrimination based on her marital status.

Owens' termination of Perkins' employment interview as soon as he learned that she lived with her fiance was an act of discrimination against her with respect to hiring because of her marital status. This action was taken by Owens for the same reason Crevier refused to hire Marilyn Crosby, and the action violated Minn. Stat. § 363.03, subd. 1(2) (a) for the same reasons as stated above with respect to Ms. Crosby.

*Steven Bruhjell*

Mr. Bruhjell, a person whose religious beliefs and practices conflicted with those of Arthur Owens, is a member of the same class of persons entitled to protection under § 363.03, subd. 1(2) as Robin Carnahan, Beverly Larsen (Matha) and Robert Severin. He is not, and never has been, a "Born-Again" Christian. On several occasions, he was informed that the reason he had not been promoted into the Respondents' management was because of his religious beliefs. Jim Chapman testified that he had recommended Bruhjell for management because he was a good worker and qualified for promotion, and that Mr. Owens then told him "I won't have anybody in management who isn't a Christian." Also, Bruhjell"s sales record was very good. This establishes that Bruhjell was otherwise

qualified for promotional upgrading of his employment and that he was not upgraded. Since he was passed over for promotion on more than one occasion, the final required element of a *prima facie* case of discrimination (that the employer sought people with similar qualifications to fill the position) is also met.

The Respondents have come forward, through the testimony of Mr. Owens and Vicki Owens (Stanley), a former co-worker of Bruhjell's and Mr. Owens' daughter, with evidence to the effect that Bruhjell was not promoted because of his personality, which Arthur Owens and his daughter (one of the persons promoted to management instead of Bruhjell) viewed as argumentative and rebellious. Owens testified that he told this to the Charging Party at their last meeting, and that he suggested to Bruhjell that, in order to change his personality, he should first accept Christ as his Savior.

The Hearing Examiner concludes that the reasons advanced by Sports and Health for Steven Bruhjell's non-promotion are pretextual. This is so because the Complainant has proven by a preponderance of the evidence that religious reasons more likely initiated the Respondents' refusal to promote Mr. Bruhjell than the reasons advanced by Mr. Owens and his daughter. Owens' own testimony is that religion was one reason for not promoting Bruhjell. This is consistent with the fact that Owens had decided to elevate only "Born-Again" Christians to management at least 18 months before Bruhjell resigned. Bruhjell testified that Owens told him that his religious beliefs were the only reason he had not been promoted. In addition, Jim Chapman's testimony that Owens responded "I will not have anybody in management who isn't a Christian" is evidence

from a third party that the likely motivation for not promoting Bruhjell was the Charging Party's religious beliefs. The record also contains a written statement from Craig Dahlin (one of the Respondents' Club managers) to the effect that Bruhjell was not promoted because of religion.

It is unlikely that Mr. Bruhjell would have been retained in the Respondents' employ as an associate membership director for 3-1/2 years if he was argumentative and rebellious to authority. The Hearing Examiner so concludes even though the last period of Bruhjell's employment was spent under the managership of Jim Chapman, because Owens' own testimony was that he still felt that Bruhjell was rebellious and argumentative and told him so in late 1976. The record shows that Owens had decided to purge his organization of such employees long before that time, so the fact that he had not fired Bruhjell by December of 1976, and did not do so during their final meeting, casts doubt on whether Bruhjell was not upgraded for any reason other than his religious views. The Hearing Examiner is persuaded that it was more likely Bruhjell's religious views that caused his non-promotion and not any other reason advanced by the Respondents, so the Complainant has, by a preponderance of the evidence, directly proven that the other reasons are pretextual. *See, Texas Department of Community Affairs v. Burdine, supra,* at 255 and *Lamb v. Village of Bagley, supra,* at 510. The Respondents' actions in not promoting Steven Bruhjell violate Minn. Stat. § 363.03, subd. 1(2)(c), which prohibits an employer from discriminating against a person with respect to the upgrading of his employment because of religion.

*Katherine Lamannsky*

The elements of a *prima facie* case that Katherine Lamannsky was not hired as a receptionist/associate membership director by the Respondents because of her marital status ("divorced", and therefore, single at the time of the interview) were established by the Complainant because (1) the Charging Party was divorced, and thus in a protected class because a currently "divorced" person has a marital status of being single, (2) she was rejected for the job, (3) the Respondents continued to seek qualified persons for the position, and (4) she was capable to perform the work. Element 3 was established because Respondent Crevier did give Ms. Lamannsky an employment interview. The final element, capability, was established because it was unrebutted that Lamannsky had an extensive background in dance, that she continuously kept in good physical condition by riding, bicycling, working out and a variety of other physical training, and Crevier did not terminate the interview except when she refused to answer detailed questions about her divorce. In addition, she meets the Respondents' criterion that she possess a "disciplined lifestyle" because she was holding down both a full-time (Staff Plus Temporaries from 8:00 a.m. to 4:30 p.m.) and a part-time (First Minneapolis Bank from 5:00 to 10:00 p.m.) job at the time she was interviewed.

Marc Crevier testified that Lamannsky was not hired because he felt she did not have the outgoing, friendly personality and pleasant appearance necessary for a receptionist in one of the Respondents' Clubs. Although Crevier never said this to the Charging Party, and the Respondents have advanced no other reason for not hiring Lamannsky, their

reasons are legitimate, business-related and sufficient, given the context of the job for which she was considered, to shift the burden of proof back to the Complainant. For the reasons stated below, the Hearing Examiner concludes that the reasons advanced for not hiring Lamannsky are pretextual.

Lamannsky was never told that she could not work for Sports and Health because of her appearance and/or her personality. Most of the job interview consisted of an interrogation by Crevier into the reasons why Lamannsky had gotten her divorce. Her divorce was still the focus of the "interview", which by that time had become almost a lecture, when Crevier told the Charging Party that he did not think she was fit to work for the Respondents and she departed. Crevier's testimony does nothing to refute the Charging Party's recollection of the conversation. It is possible (under the *Burdine-Lamb* approach) to indirectly establish pretext if the Hearing Examiner is persuaded that the employer's proffered reasons for not hiring a person are unworthy of credence. Given this, the Hearing Examiner would be left to determine from his own observations of Lamannsky at the hearing whether she possessed a personality and appearance appropriate for functioning as one of the Respondents' receptionists. He is unable to make that judgment because, although the witness seemed to be uncomfortable at the hearing, had to be prompted to speak louder and was reticent in her manner of speaking, there is no way to tell what sort of image she projected at a job interview three years prior to the hearing. It is also impossible to judge how the witness behaved or appeared before Crevier began questioning her about a personal matter related to her marital status—the circumstances of

her divorce. Given the interrogation to which Crevier subjected her on that subject, it is understandable that Lamannsky may not have appeared pleasant or outgoing.

It is concluded that the Complainant has established that Lamannsky's status as a divorcee was what cost her the job because Crevier spent most of the interview time on that subject and was still attempting to draw her out on the subject when he told Ms. Lamannsky that she was not fit for employment at Sports and Health. From this, the Hearing Examiner concludes that Lamannsky's marital status was more likely the reason for her not being hired than her appearance or personality. Therefore, the Complainant has proved directly, by a preponderance of the evidence under the *Burdine-Lamb* standard, that the Respondents' proffered reasons for not hiring her are a pretext for discrimination. With respect to Katherine Lamannsky, the Respondents have violated Minn. Stat. § 363.03, subd. 1(2) (a) by refusing to hire her because of marital status.

*Joseph (Joe) Williams*

At the time Joe Williams told Marc Crevier that he was interested in working for the Sports and Health Club organization, and Crevier told him that, in order to do so, he would have to be a "reborn" Christian, the Respondents violated Minn. Stat. § 363.03, subd. 1(4) (a), which prohibits an employer from requiring a person to furnish information pertaining to religion before that person is employed. Williams' testimony to this effect has not been challenged. What his testimony fails to show is that Crevier directly asked Williams if he was a "reborn" Christian, or whether Williams revealed the information, but the Hear-

ing Examiner concludes that these factors are immaterial to whether *this* subsection of the Human Rights Act has been violated. This is because Crevier's statement put the Charging Party in a position of being required to furnish the information (identification of his religious status), which obviously pertains to religion, before he could be employed. Maing that requirement alone is sufficient to violate the subsection.

Crevier testified that Williams did not pursue an application for employment because he (Williams) could not write, and, after Williams told him of this disability, Crevier discouraged the application because the job required a great deal of recordkeeping. Williams contends that he told Crevier at the beginning of the discussion that he was slow at reading and writing, that he wanted a job working directly with people with a minimum of paperwork, and that Crevier then discussed the job with him and still offered him an opportunity to apply. Testimony regarding the rest of the conversation reveals that the two men then discussed the "religious" aspects of working at Sports and Health, including the requirement that Williams be a "reborn" Christian in order to be considered for employment. From these circumstances, it is concluded that Williams was "interviewing" for possible employment at the time he was required to reveal information pertaining to religion, so a violation of Minn. Stat. § 363.03, subd. 1 (4) (a) has been proven.

STATUTORY CHARGES - PUBLIC ACCOMMODATIONS

Minn. Stat. § 363.03, subd. 3 (1978) states in relevant part:

> "Public accommodations. It is an unfair discriminatory practice:
>
> to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of a place of public accommodation because of . . . religion . . .".

Minn. Stat. § 363.01. subd. 18 (1978) states that for purposes of the Minnesota Human Rights Act, the term:

> " 'Place of public accommodation' means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold or otherwise made available to the public."

The Original Complaint in this matter, issued by Commissioner McClure on October 21, 1981, alleged that the Respondents Sports and Health Club, Inc., provides public accommodations within the meaning of Minn. Stat. § 363.01, subd. 18. In their Answer to the Complaint filed on November 17, 1981, the Respondents admitted that allegation of the Complaint. The parties' positions with respect to the question of whether the Respondents' Clubs are public accommodations as defined above remained unchanged until one week prior to the hearing when, in response to the final Amended Complaint, made by Commissioner Gomez-Bethke on July 1, 1983, the Respondents filed an Answer interposing the defense that the public accommodations portion of the Human Rights Act was unconstitutionally vague and overbroad.

The parties are aware that the Hearing Examiner is restricted from making a decision striking down the constitutionality of a statute, but he can dismiss a charge if the statute on which the charge is based has been declared unconstitutional by a reviewing court. The basis for the Respondents' Motion to Dismiss is the June 7, 1983, ruling by the United States Court of Appeals for the Eighth Circuit in the case of *The United States Jaycees v. State of Minnesota, by McClure, et al.*, 709 F.2d 83 (8th Cir. 1983), which they allege strikes down the "public accomodations" portion of the Minnesota Human Rights Act relied on by the Complainant as the basis of her charges herein. The Hearing Examiner cannot agree and, therefore, denies the Motion to Dismiss.

The Respondents' Motion is denied for two reasons: (1) The Eighth Circuit's ruling is not final. The State of Minnesota has appealed the June 7, 1983, decision to the Supreme Court of the United States, which granted certiorari and heard oral arguments on April 18, 1984; and (2) A close reading of the majority opinion makes it clear that the Eighth Circuit has left intact Minn. Stat. §§ 363.03, subd. 3 and 363.01, subd. 18. as they apply to the Respondents within the context of this action.

At p. 12. of the Court's Slip Opinion No. 82-1493, the Eighth Circuit Panel declares that "the Jaycees is a genuine membership organization, whose members govern its affairs and decide its policies, not just a vehicle for the delivery of commercial goods and services". Nothing in this record indicates that the members of Sports and Health Clubs govern its affairs and decide its policies—in fact, it is essential to the Respondents' constitutional defenses herein that Respondents Owens, Crevier, and Larson

govern those affairs and control those policies. In addition, the "delivery of services" (exercise facilities, instruction in exercise and nutrition) is the basis of the Respondents' operation. The Respondents are also in business for the purpose of making a profit.

On pages 25 and 33 of the Court's Slip Opinion, it is made clear that only the threshold membership policies of the Jaycees are affected by the Court's holding, and the "public accommodations" charges in this case only relate to alleged denials of the services, facilities and privileges to persons who were already members. The majority opinion closes, on p. 37 of the Slip Opinion, by stating:

> "Our holding is a narrow one. The law (§§ 363.01, subd. 18 and 363.03, subd. 3) will continue to apply with full vigor to all business and commercial activity in the usual sense of those words—to businesses, for example, that sell goods and services to the public . . . It is only the law's interference that we hold invalid under the First and Fourteenth Amendments."

The charges in this case regarding Minn. Stat. §§ 363.03, subd. 3 have nothing to do with what classes of persons can or cannot contract for Sports and Health Club memberships. They relate instead to allegations of illegal denial of services that are sold to the public. The Respondents have admitted on numerous occasions throughout this proceeding that they are a health and exercise service business, in operation to make a profit by selling those services. The Eighth Circuit has made it clear that the laws in question still apply "with full vigor" to such operations. The consideration of whether other applications of the

public accommodations portion of the Human Rights Act apply to the Respondents is not before the Hearing Examiner because the Respondents have never raised the question. The Hearing Examiner believes it is unnecessary to decide such matters because the Eighth Circuit has made it clear that its decision does not reach the issue, under Minnesota Law, of whether the Jaycees *are* a public accommodation. The Eighth Circuit's decision deals with threshold membership policy, not with the operator's employment practices or how it treats members it has already admitted. And, no claim before the Hearing Examiner involves denial of membership based on sex.

It is clear from the record that the Respondents make the operational decisions at Sports and Health Club, Inc., not the "members" who are, in effect, customers who have purchased the services, facilities and privileges of using the Respondents' Clubs. Since the situations involved in this case are unrelated to those considered by the Eighth Circuit, the Hearing Examiner is not herein bound by its opinion.

The Court states, at page 23 of its *Slip Opinion,* that the question of whether the Jaycees are a "vehicle for the delivery of commercial goods and services" is not before it. The implication is that the Court believes businesses that offer commercial goods and services to be public accommodations are clearly within the Minnesota Human Rights Act, and that it would uphold the constitutionality of applying the public accommodations statute to such businesses.

The Hearing Examiner believes the only question he has to decide under the authority of the *United States Jaycees v. State of Minnesota* case is whether the Respondents' Clubs sell goods and services to the public.

And, since the Respondents have admitted that "service" is the major product they offer to the public, they are a "public accommodation" covered by the appropriate provisions of the Minnesota Human Rights Act.

In resolving the question of whether the Respondents' Clubs are "public accommodations" under Minnesota Law, the Hearing Examiner has considered the Respondents' argument in reliance on the case of *Schlobohm v. Spa Petite Inc.*, 326 N.W.2d 920 (Minn. 1982) and finds it to be inapposite. The *Schlobohm* case turns on whether a clause in a health club member's membership contract was unenforceable as against public policy, and the Supreme Court's decision was based, in part, on the fact that the contract was not void as against public policy because health clubs are not a regulated industry. The Hearing Examiner concludes that the Court's holding has no application here. In this case, the Legislature by passing the public accommodations sections of the Human Rights Act, has provided a regulatory scheme against which the Respondents' conduct must be judged. Therefore, the Respondents' arguments that the Hearing Examiner cannot decide the charges respecting Williams, Cameron and Ormond have been rejected. Each charge is separately considered below.

*Joseph (Joe) Williams*

The Minnesota Supreme Court has yet to issue an opinion defining an unfair discriminatory practice in the area of public accommodations. Minn. Stat. § 363.03, subd. 4, which outlaws unfair discriminatory practices in the access to or full utilization of public services (public facilities or agencies) for of all the same reasons that are pro-

hibited under the "public accommodations" subdivision, including religion, has been construed in a light which provides guidance here. In the case of *City of Minneapolis v. Richardson,* 307 Minn. 80, 239 N.W.2d 197 (1976), two Minneapolis policemen called a 12-year old black youth that they had just arrested a "nigger". In resolving that case, the Court adopted the following standard to define an unfair discriminatory practice:

> "A finding that an unfair discriminatory practice has occurred may be made when the record establishes (1) an adverse difference in treatment with respect to public services of one or more persons when compared to the treatment accorded others similarly situated except for the existence of an impermissible factor such as race, color, creed, sex, etc., or (2) treatment so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation. We emphasize that we adopt this standard as a guide to the evaluation and review of evidence in discrimination cases."

239 N.W.2d at 202.

With respect to part (2) of the above-quoted test, the Court stated:

> "When such a showing has been made, it is reasonable to require an opposing party to respond with evidence of a permissible basis for the distinction being made."

239 N.W.2d at 202.

The Human Rights Act does not specifically define "discriminate". The *City of Minneapolis v. Richardson*

Court does this, however, at 239 N.W.2d 201. The Court first noted that Minn. Stat. § 363.01, subd. 10 defines "discriminate" as "The term 'discriminate' includes segregate or separate." It then adds:

> ". . . The ordinary meaning of discrimination is well expressed in (two dictionary definitions):
>
> 'DISCRIMINATION . . . In general, a failure to treat all equally . . . Black Law Dictionary (Rev. 4 Ed., p. 553).'
>
> 'Discriminate . . . 2: to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit . . .' (Webster's Third New International Dictionary, 1961, p. 648).'
>
> The concept articulated in the above definitions is distinction in treatment of individuals based upon impermissible or irrelevant factors such as race, color, creed, sex, etc.' "

The Complainant has attempted to prove that Mr. Williams lost his membership in the Sports and Health Club because he got into an argument with Marc Crevier concerning the alleged requirement that employees go to Bible studies. This argument has two bases—(1) the close proximity in time of the argument with Crevier to Williams' being denied use of the Clubs for non-payment of membership dues, and (2) Williams' expulsion from membership even though he had paid up his current arrearages.

For the purposes of this discussion, the Hearing Examiner will assume that Williams and Crevier did, in fact, argue over a requirement, stated by Crevier, that employees

attend Bible studies. He is aware that Crevier has never admitted that he said any such thing to the Charging Party or that the two men argued over the issue, but Williams' testimony to that effect is unrebutted and has been accepted as fact by the Hearing Examiner. However, there is no evidence contradicting the testimony by Crevier and Owens regarding the arrearage and collection policies of the Respondents, and the Hearing Examiner finds the Respondents' rebuttal evidence regarding those issues to be credible. The relevant policies are that a member who is over three months delinquent in his dues will be referred to the North Star Collections Agency and required to pay up his arrearages and one-year's dues in advance before being readmitted. While Joe Williams was never referred to North Star Collections or made to pay cash "up front" for advance dues, Owens' testimony to the effect that he gave the Charging Party a "break" by requiring only that he become current and sign a note to pay the advance dues is both unchallenged on the record and credible. While the Complainant proved that Williams did bring his arrearages and dues up to date, there is no evidence that he paid the required year in advance or signed a note pledging himself to do so. Since the Charging Party violated one of the conditions of continuing membership by not signing a pledge to pay one-year's advance dues, a condition that is neutral on its face and has not been shown to be related to his religious beliefs, no denial of the provision of public accommodations because of religion has been proven. The proximity in time of these events to Williams' interview with Crevier is coincidential, and a causal relationship has not been shown by a preponderance of the evidence.

The Respondents also allege that Mr. Williams was loud, abusive, used vulgar language (against Club rules) and once threatened physical violence against Marc Crevier, prompting a call to the police, when he was denied admission to work out because he was unable to show Club receptionists that they were in error in thinking that his dues had not been paid. Some of the incidents may have been caused, in part, by a breakdown in the Respondents' computerized records which should have shown Williams to be current, but the fact that Williams behaved inappropriately has still been proven. The testimony of Owens, Crevier and Frances Raynes (Taylor) regarding Williams' temperamental outbursts has been accepted by the Hearing Examiner as factual. While Williams denied these allegations, the Hearing Examiner is unable to attach sufficient credibility to those denials to overcome the credible testimony of Crevier and Raynes regarding his temperamental tendencies. Counsel for the Complainant has urged the Hearing Examiner to take note of the Charging Party's exemplary behavior during the hearing, especially under cross-examination regarding his alleged illiteracy, that may have provoked a temperamental outburst from someone with the tendencies the Respondents allege Williams possesses. The Hearing Examiner is unable to attach any meaningful weight to such observations, however, because the style employed by Respondents' counsel during the cross-examination was polite and non-provocative. Furthermore, the record shows that Williams had many stresses in his life during the summer and fall of 1980, the general time of the events that lead to his expulsion from membership. He had been recently divorced, a circumstance that left him "broke". He

had also just quit his job to concentrate on body-building competitions and thus had no steady stream of income. Using Sports and Health's facilities had become extremely important to him. These circumstances, admitted to by the Charging Party, tend to diminish the credibility of his allegations that he was able to hold his temper upon being denied entrance to the place around which his life was then centered. For these reasons, and those outlined above, the Complainant has failed to prove by a preponderance of the evidence that Joseph Williams was denied the services of or expelled from the Respondents' facilities because of religion.

The Complainant has failed to establish that Joe Williams was a victim of discrimination in the provision of a public accommodation under the *Minneapolis v. Richardson* standard because (1) there is no evidence that the Respondents treated Williams differently than anyone else who was deliquent his dues; and (2) the Respondents' treatment of Williams was not at variance with what would reasonably be anticipated as a way to treat persons who fall into arrears. That portion of the Complaint alleging a denial to Mr. Williams of the full and equal enjoyment of the Sports and Health Clubs has, therefore, been dismissed.

*Miriam Cameron*

The Hearing Examiner has granted relief to Ms. Cameron under Minn. Stat. § 363.03, subd. 3 because he is persuaded that the interrogation to which she was subjected by Marc Crevier regarding the religious opinions presented in her book was a denial to her of the full and equal enjoyment of the services, facilities and privileges of membership in the Sports and Health Clubs because of religion.

Miriam Cameron is Jewish, and she wrote a book that the Respondents view as contradictory to two basic tenets of their religious beliefs. The first contradiction is that the book acknowledges a number of ways to reach God, in contrast with the Respondents' belief that there is only one way. Secondly, the book omits any reference to homosexuality, which the Respondents believe to be sinful. Marc Crevier told Cameron, in the women's office of the LaSalle Sports and Health Club, that those two problems with her book made her book "dangerous" and, therefore, the Club would not take notice of her work in its newsletter. The problem is not with what he said, but with how he said it. The Hearing Examiner believes Cameron's testimony that Crevier, with Frances Raynes (Taylor) present and contributing only a minor role, repeatedly went over and over the differences that the Respondents had with Cameron's religious views, and continued to do so to the point of harassment and ridicule. Cameron testified that the experience "overwhelmed" her and was "very painful". She added that she was "wiped out" and "totally demoralized". The Hearing Examiner also believes Michael Ormond's testimony that, when he arrived at the office to pick up Ms. Cameron, Marc Crevier was "aggressively grilling" his fiancee, who was "obviously extremely uncomfortable . . . faint, teary-eyed". Ormond also testified that Crevier was leaning over the desk, his jaw was firm, and he was questioning Ms. Cameron with a raised voice and an angry look (like an "angry patriarch") on his face. The Hearing Examiner concludes that such circumstances, wherein Cameron was intimated, humiliated, and ridiculed because of her religious views, constitute treatment so at variance with what would reasonably be anticipated absent dis-

crimination (against a person whose religious views differ from theirs) that discrimination is the probable explanation for the Respondents' conduct under the *Minneapolis v. Richardson* test noted above under the Joseph (Joe) Williams subheading.

The record establishes that Ms. Cameron was treated the way she was by Crevier (and, to a lesser extent, by Raynes) because of her religious views. And it establishes that the way she was treated is at variance with the treatment that could reasonably be anticipated in such a situation. The Respondents have the right to refuse to publish notice of Cameron's book in the Club newsletter for the reason they stated—the book is something they choose not to promote because it was perceived as differing in philosophy from the religious views of the Respondents. However, the fashion in which the rejection decision was expressed goes far beyond what a Sports and Health Club member should reasonably be held to anticipate. That is, the member cannot be held to reasonably anticipate a devastating verbal assault against her by a person representing the Club because her religious views differ from those of Club management. In so concluding, the Hearing Examiner is mindful of the fact that the Respondents' witnesses (Crevier and Raynes) testified that Cameron herself initiated the events leading to the conversation by requesting that notice of her book be published, and that the conversation was polite and intellectually-oriented. The Hearing Examiner finds the question of who initiated the consideration by management of a decision to publish notice of the book's existence to be of little concern because, even if Cameron initiated the Respondents' consideration of whether to recognize her work, the focus of this inquiry is

the Respondents' conduct in letting her know that recognition was being refused. As to the issue of how Crevier behaved during the conversation, it is concluded that the recollections of Cameron and Ormond are more credible than those of Crevier and Raynes. As indicated above, the Examiner found Cameron and Ormond to be completely believable witnesses. He feels the same way in general about Marc Crevier, but concludes from a general analysis of the record and from observing him during the course of the 14-day hearing that Mr. Crevier is very defensive, opinionated and doctrinaire regarding his particular religious beliefs. He reacts swiftly and in a heavy-handed manner against any religious-based dissent or criticism—for example, Robin Carnahan and Beverly Larsen were dealt with swiftly and heavily when they raised religious-based dissent to Club management. In addition, Mr. Crevier believes that his religion requires him to be fervently evangelistic regarding his beliefs, and that it is important to "witness" for Jesus Christ by attempting to convince others to embrace "Born-Again" Christianity. Given these tendencies of Mr. Crevier, it is not difficult to believe that he came down upon Ms. Cameron in a heavy-handed fashion because of what he perceived her beliefs to be. The charging Party came to the LaSalle Sports and Health Club for a physical work out, and could not have reasonably anticipated that a ordeal of rigorous mental and emotional exercises would follow. Frances Raynes' testimony is the only evidence regarding the conversation in question that comes from a witness who has no financial stake in the outcome of this case, but the Hearing Examiner is unable to assign a great deal of weight to her recollections because she admitted in her testimony that she is a "Born-Again" Chris-

tian because of Mr. Owens' influence and that the Respondents treated her very well during her employment with them, ultimately promoting her to managership of one of their Clubs. It is also concluded that Crevier and Raynes are less likely to recall in detail a conversation which, given their approach to "Born-Again" Christianity, represents only one of many instances in which they have attempted to convince persons of their religious views, than Cameron and Ormond, who are likely to remember vividly the details of a conversation that formed the basis of their decision to resign from membership and file charges of discrimination.

The fact that Cameron remained as a Club member for approximately four or five months after her humiliating experience presents a problem, however, because it tends to establish that the treatment of her during the August, 1980 conversation may not have been as troublesome to her as she has implied. However, the Hearing Examiner has decided to accept the Charging Party's explanation to the effect that she kept up her membership as long as she did because she still desired to work out, the Respondents' facilities were (and are) outstanding and the dues are relatively inexpensive compared to those at other health clubs. In addition, the frequency of her visits to the Club dropped off after the incident in question. She decided to drop out because the Respondents continued to post the signs to which she had objected, leading her to conclude that the Respondents really were anti-Semitic. This explanation is reasonable and deserves credence, given the treatment she received due to her religious views in August, 1980.

The Hearing Examiner has decided that a payment to Cameron of $230, with interest, from the Respondents is

appropriate compensation for Cameron because that figure represents her initial membership fee. Although she demanded a $350 refund, it is appropriate to subtract her monthly dues for the first year ($120) from the award because there is no evidence showing Cameron did not fully use the clubs' facilities during her first year of membership.

*Michael Ormond*

The Complainant has not proven a case of discrimination against Mr. Ormond, who is Jewish, in the provision of its services and facilities as a public accommodation because of religion under the *Minneapolis v. Richardson* standard laid out under the Joseph (Joe) Williams subheading. Since there is no evidence suggesting that Mr. Ormond was humiliated or intimidated because of his religious beliefs during the brief time he was involved in the conversation that forms the basis for Miriam Cameron's recovery, the basis of his charge is that the "general atmosphere" of the Sports and Health Clubs he used was anti-Semitic and, because of this, he was denied the full and equal enjoyment of the services, facilities and privileges of the public accommodation because of his religion (Jewish). The evidence supporting this charge is the increasing dissemination of fundamentalist Christian literature in the lounge and lobby areas during the time of Ormond's membership and the proliferation of signs at LaSalle which caused offense to him as a Jewish individual. The most offensive such sign to him, the one that he asked, unsuccessfully, to be removed, and the one which most directly attacks Judaism

is the large poster at the entrance to the LaSalle Club's exercise floor which branded Judaism as a "False Cult".[3]

There is no evidence indicating that the Respondents refused to allow Mr. Ormond to enter its Clubs and use their exercise facilities and equipment, that any of the services offered to members (such as a program of exercise and diet) were denied to him, or that he was excluded from any privileges that go along with being a member in good standing. In addition, the record shows that he could have gone elsewhere, and ultimately did so, if the literature and signs bothered him to the point of making continued membership in their Health Club impossible. The record fails to show that the Respondents have a monopoly in the Twin Cities area on exercise facilities and personal service to persons who want to work out and improve their health and dietary habits. Finally, Mr. Ormond's and Ms. Cameron's charges are the only ones which have been brought to the attention of the Hearing Examiner in an effort to prove that the Respondents' dissemination of literature and posting of signs proclaiming their "Born-Again" Christian beliefs is a practice that prevents anyone from the full and equal enjoyment of the services and facilities of the Sports and Health Clubs. Absent evidence indicating otherwise, the Hearing Examiner assumes no similar grievances have been made to the Human Rights Department. The implication that none of the thousands of other persons, drawn from the general public, who used the Clubs took offense sufficient to prompt them to complain to the Department of Human Rights is extremely significant beccause it tends

[3]For purposes of this discussion, the Hearing Examiner assumes that Mr. Ormond's description of the sign, showing Judaism denominated as a "False Cult" is accurate, even though the Respondents' testimony is that the sign may have had a different heading.

to establish that the material which offended Mr. Ormond and Ms. Cameron may not be offensive enough to cause a reasonable person to feel that they are not able to freely use the services and facilities which the Respondents offer. Ormond's charge is also weakened by the fact that he retained his membership for several months after the placement of the literature and posting of the signs that offended him.

Under the *Minneapolis v. Richardson* standard, the Complainant has failed to prove by a preponderance of the evidence that either of the alternative methods of establishing an unfair discriminatory practice with respect to Michael Ormond because of religion has been met. First, it has not been shown that Ormond was treated adversely or differently from any other Club member due to his being Jewish (or of any other persuasion with which the Respondents disagree) because the signs and literature to which he took offense are in the plain view of everyone who uses the Club and the Charging Party was never denied the use of any facility, service or privilege the Club offered to anyone else. The second *Minneapolis v. Richardson* test, treatment so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation, has not been met because there is no factual showing that the treatment of Ormond was at variance with what would reasonably be anticipated by one who joins a facility such as the Respondents'. A person who joins a Sports and Health Club can reasonably anticipate the use of the exercise area and equipment provided, personal service in developing a program of exercise and diet, and the freedom to use the facilities which provide for relaxation and hygiene such as saunas, whirlpools, showers and the like. Nothing in the record indicates that the Charg-

ing Party was denied any of these things. There is also no evidence that any of the Respondents' employees or agents intruded upon Ormond with an oral appeal to accept the Respondents' religious opinions. As implied in the preceding paragraph, there are any number of persons who may have used the facilities at the LaSalle Club, seeing the same sign that caused Ormond to file a charge, and who belonged to one of the religions the sign called a "False Cult", but none of them have been shown to have filed a charge alleging discriminatory treatment. None of the signs or literature found offensive by the Charging Party were directed personally at him, or specifically at Judaism alone. And Ormon continued to use the Club on an intermittent basis for several months prior to requesting a refund of his membership fee, during which time the signs and literature that offended him were still on the premises. The Hearing Examiner concludes that the essential element of the second *Minneapolis v. Richardson test*, treatment at variance with what would reasonably be anticipated in a place of public accommodation, has not been established. Absent any evidence that Mr. Ormond was denied the use of the Respondents' facilities, the charge that he was discriminated against in using a place of public accommodation due to his religion must be dismissed.

In arriving at this result, the Hearing Examiner has considered the content of the literature and signs which Mr. Ormond found offensive and which the Complainant maintains denied the Charging Party the full and equal enjoyment of the Sports and Health Clubs. The Hearing Examiner believes that the obvious purpose of the signs and pamphlets, passive forms of speech, were to proselytize (or attempt to convert) the readers, not to insult them. As such, they are

protected speech under the Minnesota and United States Constitutions. See, *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S.Ct. 766 (1942) and *Terminiello v. Chicago,* 337 U.S. 1, 69 S.Ct. 894 (1949), which protect the expression of an opinion that falls short of "fighting words" and is not likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience or annoyance. In *Beaucharnais v. Illinois,* 343 U.S. 250, 72 S.Ct. 725 (1952), the Court was faced with a "group libel" situation where persons were distributing handbills that viciously attacked all black people. The standard adopted by the Court was that such "speech" was not protected if it was productive of breach of the peace or riots. The "False Cults" sign, and others described on this record, do not reach that level of intensity.

## THE RELIGIOUS CORPORATION EXEMPTION

Minn. Stat. § 363.02, subd. 1, grants exemptions to Minn. Stat. § 363.03, subd. 1, which enumerates unfair discriminatory practices in employment. Section 363.02, subd. 1(2) reads:

> "The provisions of section 363.03, subd. 1, shall not apply to . . .:
>
> (2) A religious or fraternal corporation, association, or society, with respect to qualifications based on religion, when religion shall be a bona fide occupational qualification for employment;"

On March 2, 1984, the Hearing Examiner issued a Letter/Order to Counsel for the parties, ordering them to file Supplementary Briefs on certain issues raised by the

Hearing Examiner. Among those Orders is a request that Counsel for the Respondents explain ". . . why, in light of the fact that the Respondents have never pleaded an exemption under Minn. Stat. § 363.02, subd. 1(2) (for religious corporations), the Respondents have not violated the applicable provisions of Minn. Stat. § 363.01, subd 1?" This question was one of a series that was asked regarding the Respondents' practice of inquiry into a person's religious beliefs prior to hire, in light of the Respondents' stated defense based on bona fide occupational qualifications ("b.f.o.q."). The issue of b.f.o.q. exemptions in general will be explored in greater detail under a subsequent heading.

In his Supplemental Memorandum in Response to the Hearing Examiner's Letter/Order, filed on March 26, 1984, Counsel for the Respondents requested that the Hearing Examiner waive the possible technical defect in pleading that exists by the Respondents' failure to plead the § 363.02, subd. 1(2) exemption if the Hearing Examiner is convinced that the evidence shows that the Sports and Health Club, Inc., otherwise fits the requirements of the exemption.

The Hearing Examiner is unable to grant Counsel's request, even if the Respondents Sports and Health Club, Inc., qualifies as a "religious corporation" within the meaning of the exemption, because the defense was not pleaded. In addition, after careful consideration, the Hearing Examiner has decided that Sports and Health does not qualify for the exemption.

The Hearing Examiner concludes that the exemption granted in § 363.02, subd. 1, applies only to corporations, associations or societies whose primary purpose is ecclesi-

astical, which is defined as "of or relating to a church, especially as a formal and established institution" or "of or relating to the formal and established institutions or government of any religion". Webster's Third New International Dictionary (1971). Sports and Health Club, Inc., is not such an organization. The primary purpose of the Clubs is to provide exercise and health services to its members for a fee. The fact that the Respondents operate the Clubs in a manner based on their religious convictions is incidental to the primary purposes of the business. Therefore, the Respondents do not qualify for the exemption accorded religious corporations from the unfair discriminatory practices in employment sections under Minn. Stat. § 363.01, subd. 1.

Several federal court cases have interpreted the exemption comparable to Minn. Stat. § 363.02, subd. 1(2) granted at § 2002e.2 of 42 U.S.C. (Title VII of the Civil Rights Act). A review of those cases, most of which deal with organized churches and organizations that they own or control, shows that the focus of the Courts' inquiries has been on whether the employment in question is connected with the employer's "religious activities" or is a matter of "prime ecclesiastical concern", as distinguished from the performance of a "secular" function.

If an employer survives the threshold inquiry of whether it is, in a general sense, a religious organization, religion must still be a bona fide occupational qualification for the employment in question in order for the exemption to apply. In this case, the Hearing Examiner has concluded that the primary thrust of the employer's organization is secular and not grounded in religion because exercise and health service facilities, such as the Sports and Health Clubs, do

not render a product or services primarily related to religion. However, two recent Federal Circuit Court decisions are useful in analyzing how the Hearing Examiner would rule on the issue if he had been convinced that the Respondents operated a "religious" organization. The first, *EEOC v. Mississippi College*, 626 F.2d 477, cert. denied, 101 S.Ct. 3143 (1981), involves teachers at a religious school. The Court states, at 626 F.2d 485:

> "That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of this employment matters of church administration and thus purely of ecclesiastical concern".

In the case of *EEOC v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982), wherein a woman who functioned as an editorial secretary for a non-profit religious publishing house which was affiliated with the Seventh-Day Adventist Church, the Court held that her position, at its broadest, did not fulfill the function of a minister, nor was her employment at the publishing house the type of critically sensitive position within the church such that Title VII's religious organization exemption applied. The lower Court decision in the same case, reported at 482 F.Supp. 1291 (No. D. Calif.), found it important, as does the Hearing Examiner in a case like this matter, to determine whether an institution has "segregable secular components" and that "those are what are being regulated", 482 F.Supp. at 1311. This inquiry becomes significant again in analyzing the issue of whether enforcement of the Minnesota Human Rights Act against the Respondents constitutes an unconstitutionally impermissible "establish-

ment of a religion", or infringes on the Respondents' "free exercise of religion", which issues will be decided under subsequent headings in this Memorandum. At this point, it is enough to hold that the Respondents fail to qualify for exemption from Minn. Stat. § 363.03, subd. 1, because the activities of the Respondents under scrutiny as a matter of the charges herein are primarily, if not wholly secular.

## BONA FIDE OCCUPATIONAL QUALIFICATIONS (B.F.O.Q)

Minn. Stat. § 363.03, subd. 1, lists unfair discriminatory practices in employment. The first words of that statute, however, grant a blanket exception, as follows:

> "Except when based on a bona fide occupational qualification, it is an unfair employment practice: . . ."

The Respondents have interposed the bona fide occupational qualification (b.f.o q.) defense throughout this action with respect to hiring and/or promoting certain persons because of religion or marital status. They admit that they will not promote anyone into management who is not a growing, "Born-Again" Christian. They admit that it is their policy not to hire persons they reasonably believe to oe fornicators, because their religious beliefs lead them to conclude that such persons are immoral. They argue that they should be able to inquire, prior to hiring, about the personal or religious beliefs and life styles of prospective employees in order to determine "what kind of person(s) they are". They believe that such inquiries are the only way to find out whether the applicants possess the

"teachable spirit" and "disciplined life style" they seek in their employees. Their religious convictions forbid them from elevating into management persons whose religious beliefs and practices are different from theirs (which they view as the only way to God) because such elevation would constitute an "unequal yoking" of themselves and "unbelievers" in defiance of God's law. Even though they enforce such practices, the Respondents allege that they do not conflict with the unfair discriminatory practices listed in the statute because their practices are based on b.f.o.q.s. Those portions of the Respondents' arguments noted above which should be more properly discussed under the "free exercise of religion" heading below will be analyzed in that portion of this Memorandum.

In commenting on a case involving whether an employer's anti-nepotism policy violated the marital status provisions of § 363.03, subd. 1, the Minnesota Supreme Court stated:

> "Acknowledging the fundamental nature of the relationship, the legislature in drafting the Minnesota Human Rights Act intended that only where a *business necessity* is *compelling and overriding* may an employer differentiate on the basis of marital status. To justify such an employment policy, an employer must advance a bona fide occupational qualification which will withstand the strict scrutiny of a reviewing court. Mere business convenience is insufficient." *Kraft, Inc. v. State,* 284 N.W.2d 384, 386 (Minn. 1979) (emphasis supplied).

Justice Wahl, with Justice Yetka joining, recently articulated the opinion that b.f.o.q.s. must be "inherently

required by the nature of the business" in a dissent from an opinion that did not reach that issue but ruled on another aspect of marital status discrimination. *Cybyske v. I.D.S. #196,* Case C9-83-539, Finance and Commerce, 4/6/84.

The Eighth and Fifth United States Circuit Court have adopted a two-pronged test which the Hearing Examiner has found useful in analyzing the Respondents' b.f.o.q. claims with a view to determining whether they have shown a "compelling and overriding business necessity" for the exclusion from its employ of certain classes of workers. The standard for analysis is: (1) the employer must demonstrate that the job qualifications he invokes to justify his discrimination are "reasonably necessary" to the essence of his business;[4] see, *Houghton v. McDonnell-Douglas Corp.*, 573 F.2d 561 (8th Cir. 1977), and Usery v. Tamiami *Trail Tours,* 531 F.2d 236 (5th Cir. 1976) and (2) whether the employer has a factual reason for believing that members of a certain class are unable to perform the job; see, *Weeks v. Southern Bell Telephone and Telegraph Company,* 408 F.2d 228, 235 (5th Cir. 1969). These cases allow an employer who has made such a demonstration to inquire of or solicit the class information from an employee or prospective employee if that is the only way to learn whether the employee possesses the trait (such as religion or marital status). See, Larson, *Employment Discrimination,* Vol. 3, § 100.13.

The above-cited cases involve qualifications based on age (*Houghton* and *Usery)* and sex *(Weeks),* and they represent a liberal (for employers who seek to invoke class-

[4]This test closely parallels Justice Wahl's opinion that a b.f.o.q. must relate to an inherent requirement of the employer's business.

based qualifications for employment) departure from the "extremely narrow" construction approach taken in later (than *Weeks)* sex discrimination cases such as *Rosenf eld v. Southern Pacific Co.,* 444 F.2d 1219 (9th Cir. 1971) and the United States Supreme Court's opinion in *Dothard v. Rawlinson,* 433 U.S. 321, 97 S.Ct. 2720 (1977). This test, as articulated by the *Rosenfield* Court at 444 F.2d 1224, is:

> "Based on legislative intent and on the Commission's interpretation, sexual characteristics, rather than characteristics that might, to one degree or another, corrolate with a particular sex, must be the basis for the application of the B.F.O.Q. exception."

In other words, the "extremely narrow" view is that "sex" in the b.f.o.q. exception refers to sexual characteristics as such, rather than to non-sexual traits that are associated with one sex either by widely prevelant sterotyped views or even by statistically proved evidence. One obvious example of permissible specification of sex would be announcing that only women need apply for a job of attendant in a women's toilet. A classic example of the more debatable specification found by the *Rosenfield* and *Dothard* Courts would be the barring of all women from jobs requiring the lifting of heavy weights, such as 50 or more pounds. Larson, *Employment D'scrimina'ion,* Vol. 1, §§ 13.00-14.00. The prevailing view is that the *Rosenfield-Dothard* "extremely narrow" test will not be applied in areas other than discrimination because of sex, thus making it easier for an employer to prove existence of a b.f.o.q. in areas such as religion and marital status. Larson, *Employment Discrimination,* Vol. 3, § 100.12. One United

States Circuit Court, the Seventh, has adopted a broader view than the above-noted second prong (the *Weeks* standard. In *Hodgson v. Greyhound Lines, Inc.*, 499 F. 2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1112 (1974), the employer was allowed to invoke a b.f.o.q. based on age if it could show that it had a "*rational basis in fact* to believe that elimination of its maximum hiring age will raise the likelihood of risks to passengers". (Emphasis supplied.)

The Hearing Examiner will address below the various types of employment practices invoked by the Respondents against the Charging Parties herein, and against other persons who testified at the hearing, in an attempt to determine whether they meet the test for establishment of b.f.o.q.s.

*Religious-based questions before hiring*

The Respondents routinely asked job applicants if they pray regularly, whether they go to church, if they believe religion is a private matter, if they and their spouses pray and/or worship together, and whether they would be "uncomfortable" in a work atmosphere of evangelistic fervor on the part of their co-workers. On occasion, they directly ask if an applicant is a Christian. They ask these questions, because, among other reasons, they will not knowingly hire anyone who is "antagnostic to the Gospel". They are also interested in finding out if the applicant possesses the "teachable spirit" and "disciplined lifestyle" they deem necessary in their employees in order for the business to succeed (because the employees are constantly undergoing training and the work rules are strict). They

also do not want to hire persons who will not fit in with their present employees.

The Hearing Examiner is unable to conclude that the Respondents have shown that it is "reasonably necessary" to the essence of their business to exclude persons who they believe give the "wrong" answers to the above-noted questions (and thus form a class which is discriminated against because of religion). The essence of the employer's business is not a "discipleship for Christ", as Owens once told Robin Carnahan, but rather the operation of an exercise emporium. The Respondents argue that everyone has a religion, and that the person's religion controls his personality. This approach, a belief in itself, has not been (and perhaps cannot be) demonstrated objectively. The Hearing Examiner agrees that an employer who operates a service-oriented business should be able to find out "what kind of person(s)" the interviewees are, to ascertain whether they possess a "teachable spirit" and/or a "disciplined lifestyle", and to try to determine whether a prospect for hire would be compatible with the rest of his staff. But, he cannot agree that the Respondents must use the religious-based questions noted under this subheading to find out if someone possesses those characteristics.

What is being done by the Respondents in asking the above-noted pre-employment inquiries is the administration of a religious "litmus test", wherein they presume that anyone eliminated because they will not answer the prohibited questions or because they answer them in a manner with which the Respondents disagree, based on the religious beliefs of the Respondents, is unfit to work for them. This leads into the second prong of the *Houghton-Usery-Weeks* test, whether there is a factual basis (or a ra-

tional basis in fact, under *Greyhound*) for believing that persons in the class eliminated by the "litmus test" cannot do the work. Since there is no factual basis or rational basis in fact for supporting this belief of the Respondents, the b.f.o.q. defense to their asking of religious-based questions prior to hire is unavailable. It is so concluded because persons who are rejected because of being non-Christian, because they are offended by the evangelistic atmosphere, because they do not attend church regularly, or because they do not pray have not been shown, on this record, to lack the qualities the Respondents desire in their service employees, a "teachable spirit" and a "disciplined life style", because of those characteristics. This is because the characteristics of prospective employees which the Respondents seek to learn with the questions they ask are grounded in *their* own religious beliefs, just as the Respondents ground their opinions in their religious beliefs. What the Respondents are soliciting, and judging people on, are their *opinions*, which have not been shown to relate in any factual way to what is necessary to work successfully at a Sports and Health Club.

*Marital status and sex- based questions*

The Respondents are interested in learning a variety of things, and ask about them, if they are able to ascertain a person's marital status. All such inquiries relate back to the interviewee's marital status and/or sex. The purposes of the questions vary: (1) they believe that women are subordinate to men and should have the permission of the "responsible" men in their lives (husbands, fathers) to work and/or live away from home; (2) they want to know who was "at fault" and presume, unless shown otherwise,

that the woman was in instances involving persons who are or who have been divorced; and (3) they ask single persons who live away from home whom they live with and, if they live with an unrelated member of the opposite sex to whom they are romantically attached, they presume he/she is a fornicator and will not hire them. The basic reason for these inquiries is their belief that persons who are on the "wrong" side of the above-listed "litmus test" questions relating to marital status and/or sex are either immoral or lack the requisite "teachable spirit' 'and "disciplined life style" they look for in an employee.

In applying the standards derived from the cases noted earlier, the Hearing Examiner again emphasizes that the record shows that the "essence" of the Respondents' business is an exercise and health club that relies on sales of membership to continue functioning. The employer argues that the basic job qualifications of having employees who possess "teachable spirits" and "disciplined life styles" are necessary to a sales and service business, and the Hearing Examiner agrees with that as a general proposition. However, the Hearing Examiner cannot agree that the Respondents must make inquiries of the nature of those noted above in order to ascertain if an applicant possesses those characteristics. The record fails to establish any factual basis or any rational basis in fact for believing that the classes of persons eliminated for consideration by the Respondents are unfit to adequately perform the sales and service functions required in the business of the Sports and Health Clubs. As to Category (1) in the above paragraph, the Respondents presume that such women are rebellious to authority in general. The problem with that conclusion is that it is premised on a belief that

has no support in the record, beyond the Respondents' religious beliefs—that women are the subordinate sex.

Classification of applicants based on Category (2) fails, in part, for the same reason as Category (1) failed—it presupposes a logically fatal presumption that women are subordinate to men and therefore "at fault" in any marriage dissolution unless they can prove otherwise. The class of persons subjected to this line of questioning (divorcees of both sexes) are, it is argued, lacking a "disciplined lifestyle" because they were unable to honor the contract of marriage. The Hearing Examiner finds no factual or rational basis in fact in this record for such an argument, which ignores the tremendous variety of reasons for dissolutions of marriages in modern society. The fact that the respondents may learn, on further probing (prompted by knowledge that the interviewee is divorced) that the person lacks a "disciplined lifestyle" of is "immoral" (in order to satisfy the first prong of the *Houghton-Usery-Weeks* test) overlooks the fact that there are other ways to find out if a person is qualified to work for them.

Category (3) is justified by the Respondents on the basis that such questioning is necessary in order to avoid an inadvertent subsidization of a moral wrong—fornication. This argument fails because (1) the Legislature has made a policy decision determining that a person's status as a fornicator is immaterial to whether they should be hired for a job, absent a b f.o.q., and (2) there has been no showing of a factual or rational reason based in fact for the presumption made by the Respondents that persons who "live out of wedlock" do not, as a class, possess the requisite "teachable spirit" and "disciplined lifestyle" they

require from their sales and service personnel. Respondents' argument that a person who cannot wait until they are married to have sexual relations lacks a "disciplined lifestyle" and also sets a bad example for their co-workers is an opinion based upon their sincerely held religious beliefs but unsupported by facts or evidence on the record. For this reason, and those stated above, the Respondents do not qualify for a b.f.o.q. exception in the employment practices described under this subheading.

*Promotion to management of "Born-Again" Christians only*[5]

The fact that it is the Respondents' policy not to advance into management any persons who do not share their "Born-Again" religious beliefs, activities and practices has never been in dispute. Their basis for this policy is a sincerely held religious belief that they are forbidden by God to work with "unbelievers". Arthur Owens testified, on behalf of all the Respondents, that the employer's policy comes from 2 Corinthians 6:14 which reads:

> "Do not try to work together as equals with unbelievers, for it cannot be done. How can right and wrong be partners? How can light and darkness live together?"

The Hearing Examiner will discuss the Respondents' arguments that to interfere with this policy denies them the constitutionally-guaranteed right to freely exercise their religious beliefs or freedom of association rights under a later heading. The inquiry now is whether the Respond-

[5]For purposes of this discussion, "promotion" refers to elevation into a management position.

ents' discriminatory denial of upgrading of employment (to Club Assistant Managership or Managership) to "unbelievers" on the facially-illegal basis of religion qualifies for a b.f.o.q. exception. The Hearing Examiner concludes that it does not.

The first prong of the *Houghton-Usery-Weeks* analysis, requiring an employer to demonstrate that the job qualifications he invokes to justify his discriminattion are "reasonably necessary" to the essence of the business, has not been met because the qualifications are based on the religious beliefs of the Respondents and their potential managers, a factor not shown to relate to the essence of the Respondents' business. As mentioned above, the Hearing Examiner is of the opinion that the Respondents' primary business is the sale of membership in and provision of services and facilities in return for sales revenues and dues, of a place to physically exercise, play games, relax and be advised about a regular program of physical fitness and nutritious diet. These are secular activities, unrelated to any religious mission. President Arthur Owens' testimony to the effect that he has tried to make the Sports and Health Clubs "discipleships for Christ" is merely incidental to the "essence" of the Sports and Health operations. The Hearing Examiner is not persuaded that it is "reasonably necessary". For purposes of this analysis, the Hearing Examiner presumes that anyone under consideration for a management post will already have demonstrated to the Respondents that they possess a "teachable spirit" and "a disciplined lifestyle" or they would not still be working at Sports and Health.

In addition, the Respondents fail the second test of establishing a b.f.o.q. because they have not established a

factual reason or rational reason based in fact showing that "unbelievers" cannot qualify to manage a Sports and Health Club. The fact that they cannot qualify because of II Corinthians 6:14, which disqualifies them because of their status as "unbelievers" is immaterial, because it is a reason grounded in religious belief, not in facts placed in this record. However, there are facts in this record that tend to support the Respondents' argument. Jim Chapman, an "unbeliever", managed the Sports and Health Clubs at LaSalle, Apache and Midway. He had full operational charge at Apache and Midway for almost a decade. There has been no rebuttal to the Respondents' evidence that the Apache and Midway clubs have performed better from a profit-making standpoint since the Respondents replaced Chapman with "Born-Again" Christian managers in 1982. And no less a witness than Chapman testified that the financial performance of Sports and Health Clubs has dramatically improved since Owens took personal charge of the clubs in the mid-1970s and began to operate them using principles of management grounded in his beliefs, one of which is that it is against God's law to try to work together with "unbelievers". From the time Ira Rosen, who is Jewish, left his position as Manager of the Normandale Club, Owens and the other Respondents have promoted only from within and have only promoted "Born-Again" Christians to management. What this juxtaposition of events overlooks, however, is that there are no facts establishing a *causal connection* between rising profits and the exclusion of "unbelievers" from management positions. The "new wave" of managers may be more talented and it may be true that their management talents were honed after, or even as a result of, their decision to be "Born-

Again" in Christ. But the focus of inquiry under *Weeks* and *Greyhound* is on the excluded class, the "unbelievers". The proffered example of Jim Chapman is simply not enough to persuade the Hearing Examiner that "unbelievers" cannot manage a Sports and Health Club in a profitable manner. Therefore, the Respondents have not established that being a "Born-Again" Christian is a b.f.o.q. for a management position in their organization.

## ESTABLISHMENT OF RELIGION

The Respondents have argued that to require enforcement of the provisions of Minn. Stat. § 363.03 subd., 1 in their Clubs would be an establishment by the state of the religion of "secular humanism" in violation of the First and Fourteenth Amendments to the United States Constitution and Article 1, § 16 of the Minnesota Constitution.

The First Amendment to the United States Constitution reads:

> "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the United States Constitution reads:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

> any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The establishment and free exercise clauses of the First Amendment apply to the states as a result of the adoption of the Fourteenth Amendment. *School District of Abington Township v. Schempp,* 374 U.S. 203, 83 S.Ct. 1560, 1567 (1963), citing *Cantwell v. Connecticut,* 310 U.S. 296 (1940).

Article I, § 16 of the Minnesota Constitution, which is entitled "Freedom of Conscience; No Preference to be Given to any Religious Establishment or Mode of Worship" reads:

> "Sec. 15. The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people. The right of every man to worship according to the dictates of his own conscience shall never be infringed, nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State, nor shall any money be drawn from

the treasury for the benefit of any religious societies or religious or theological seminaries."

Humanist Manifesto I has been introduced into this record as Respondents' Exhibit 6. The document, drafted in 1933, was among the material discovered by Arthur Owens in his research undertaken to try to decide whether to withdraw his son from the public schools in the 1960's. Owens became convinced that the addition of sex education classes in the elementary schools signaled an establishment of "secular humanism" by the Minnetonka School Board. Humanist Manifesto I includes among its tenets:

"First: Religious humanists regard the universe as self-existing and not created.

Second: Humanism believes that man is a part of nature and that he has emerged as the result of a continuous process.

. . .

Fifth: Humanism asserts that the nature of the universe depicted by modern science makes unacceptable any supernatural or cosmic guarantees of human values.

Sixth: We are convinced that the time has passed theism, deism, modernism, and the several varieties of "new thought".

. . .

Eighth: Religious humanism considers the complete realization of human personality to be the end of man's life and seeks its development and fulfillment in the here and now. This is the explanation of the humanist's social passion.

> Ninth: In place of the old attitudes involved in worship and prayer, the humanist finds his religious emotions expressed in a heightened sense of personal life and in a cooperative effort to promote social well-being.
>
> . . .
>
> Thirteenth: Religious humanism maintains that all associations and institutions exist for the fulfillment of human life . . . . Certainly religious institutions, their ritualistic forms, ecclesiastical methods, and communal activities must be reconstituted as rapidly as experience allows, in order to function effectively in the modern world."

The Respondents rely on the case of *Torcaso v. Watkins,* 367 U.S. 488, 81 S.Ct. 1680 (1961) as standing for the proposition that the law recognizes "secular humanism" as a religion. That case involved an individual who was denied licensure as a notary by the State of Maryland because he would not sign a loyalty oath which required, among other things, that he declare a belief in God. The *Torcaso* Court, at 81 S.Ct. 1684-5, stated:

> ". . . neither a state nor the federal government can constitutionally force a person 'to profess a belief or disbelief in any religion'. Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."

Footnote 11 in the Court's opinion reads:

> "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." (Citations omitted).

While accepting for the sake of this analysis the Respondents' argument that "secular humanism" is a religion, the Hearing Examiner is still unable to accept the Respondents' further argument that imposition upon it of the employment discrimination portions of the Mnnesota Human Rights Act constitutes an establishment of a religion. Even its own cited authority, the First Amendment to the United States Constitution and the *Torcaso* case, call into question the logic of the Respondents' assertion that requiring it to adhere to a facially—neutral set of regulations, such as those laid out in the statute, amounts to "establishing" some religion that is different from theirs. If the Hearing Examiner were to rule in favor of the Respondents on the theory that imposition of the requirements of the Human Rights Act's provisions outlawing discrimination in employment establishes a religion, the effect would be to recognize an exception to the statute for an employer (like the Sports and Health Club, Inc.) who is breaching the laws' requirements because of *his* religious beliefs. To do so, under the above-quoted provision of *Torcaso*, would amount to imposing a requirement (through the granting of the exception) that aids a religion that believes in God (as the Respondents' does) as against a religion founded on different beliefs. Granting the requested exception would also be tantamount to "making a law re-

specting the establishment of a religion" in violation of the First Amendment to the United States Constitution or giving a "preference" to the Respondents' particular "mode of worship" in violation of Article I, § 16 in Minnesota's Constitution. The only exceptions to the provisions of § 363.03, subd. 1 are for bona fide occupational qualifications, which the Hearing Examiner has already ruled upon (adversely) with respect to the Respondents.

There are a vast number of cases interpreting the establishment clause. The Supreme Court of the United States, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), devised an analytical test for guidance in determining whether a statute violates the general prohibition against the government's establishment of a religion. That test is:

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor prohibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion'. *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)."

The Hearing Examiner concludes that application of the provisions of Minn. Stat. § 363.03, subd. 1 against the Respondents does not constitute an "establishment of religion" under the above-noted standard.

The same general concern that the Respondents articulated in their defense was faced by the Supreme Court in an

earlier case, *School District of Abington Township v. Schempp, supra,* where a Pennsylvania statute requiring that Bible passages be read to public school students and that the students recite the Lord's Prayer prior to the commencement of each school day was struck down because its primary effect was to advance religion. At 83 S.Ct. 1573, the Court noted:

> "It is insisted that unless these religious exercises are permitted a 'religion of secularism' is established in the schools. We agree, of course, that the state may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe'. *Zorach v. Clauson,* 643 U.S. at 314, 72 S.Ct. at 684. We do not agree, however, that this decision in any sense has that effect."

In *Marsh v. Chambers,* 103 S.Ct. 3330 (1983), the Supreme Court let stand the 16-year practice of opening each session of the Nebraska Legislature with a prayer offered by its chaplain, a Presbyterian clergyman, whose services were paid for with public funds. The Court held, among other things, that the establishment clause does not always bar a state from regulating conduct simply because it harmonizes with religious canons. From this, it is concluded that the State of Minnesota is not barred by the establishment clause from regulating the employment practices of an employer simply because that regulation results in a situation that harmonizes with the canons of some other religious view. Therefore, even if the Respondent had shown (which it has not) that imposition on it of

the regulations laid out in the Human Rights Act regarding employment practices *does* harmonize with the canons of secular humanism, the establishment clause is not necessarily violated.

The first prong of the *Lemon v. Kurtzman* test is whether § 363.03, subd. 1 has a secular purpose. The answer to that is obvious from the face of the statute. Its purpose is to eradicate from the commercial world what the Legislature has deemed to be unfair discriminatory practices. The fact that some of the prohibited practices foreseen were based on religion does not make the purpose of the statute something other than secular, which is defined as "Of or pertaining to the temporal rather than to the spiritual", *American Heritage Dictionary*, New College Ed. 1980. The Hearing Examiner's conclusion that the statutes in question have a secular purpose is reinforced by Minn. Stat. § 363.012 (the Declaration of policy in the Human Rights Act), which declares, in relevant portions:

> "Subdivision 1. It is the public policy of this state to secure for persons in this state, freedom from discrimination;
>
> (1) in employment because of . . . religion . . . .
>
> * * *
>
> Such discrimination threatens the rights and privileges of the inhabitants of this state and menances the institutions and foundations of democracy.
>
> * * *
>
> Subd. 2. The opportunity to obtain employment . . . without such discrimination as is prohibited by this chapter is hereby recognized as and declared to be a civil right."

The Hearing Examiner is also persuaded that the principal or primary effect of the employment discrimination provisions of the Minnesota Human Rights Act is to "neither advance nor prohibit" religion within the meaning of the "second prong" of the *Lemon v. Kurtzman* standard. In a case involving the discharge from employment of an editorial secretary who worked at a religious publishing house, *EEOC v. Pacific Press Publishing Association*, 482 F.Supp. 1291 (1981), the Court examined the "primary effect" prong of the *Lemon v. Kurtzman* test by making a threshold inquiry as to whether the secular and sectarian functions of the employer could be separated. If so, and if only secular activities are being regulated, there was no violation of the establishment clause. See, 482 F.Supp. at 1310. This method of analysis was adopted by the Ninth Circuit when it reviewed the case, see, 676 F.2d 1272 (9th Cir. 1982) and closely parallels the inquiries on the same point by the Fifth Circuit United States Court of Appeals in *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), cert. denied, 101 S.Ct. 3143 (1981). These cases are among the only ones where an employer asserted that imposition of the federal statute outlawing discrimination in employment because of religion violated the establishment clause of the First Amendment to the United States Constitution.

The District Court's analysis of the second prong of the *Lemon-Kurtzman* test used in *EEOC v. Pacific Press Publishing Association* was derived from two United States Supreme Court cases that interpreted *Lemon v. Kurtzman*. See, *Hunt v. McNair*, 413 U.S. 734 (1973) and *Roemer v. Maryland Public Works Board*, 426 U.S. 736 (1976), which involved financial aid to religious schools.

In applying this test to the Sports and Health Club situation, the Hearing Examiner is persuaded that the record establishes that the employer's secular function (provision of exercise and health facilities and services) is readily segregable from its religious function, which is not part of the "essence" of its business (see discussion under the Bona Fide Occupational Qualification heading above). He is also persuaded that the requirement of the statute that the employer not discriminate in employment based on religion regulates only the *secular* portions of the Respondents' operation. Employment activities such as interviewing, hiring, promoting, discharging, development of job duties, salary-setting, and performance evaluations are not religious or sectarian (pertaining to a religious group) activities. They are ordinary, religiously-neutral actions that are a part of any business. And, since it is only such actions that are regulated by the Act, imposition of the Act's provisions upon the Respondents does not, of itself, establish a religion on the premises of an employer who is not operating a religious organization. And, as decided under an above heading, Sports and Health Club, Inc., is not a religious organization.

The above-cited case of *Roemer v. Maryland Public Works Board* was also relied upon by the *EEOC v. Pacific Press Publishing Association* Court in deciding the third prong ("excessive entanglement" of the government with religion) of the *Lemon v. Kurtzman* test. Under *Roemer*, if a determination has been made that an institution has "segregable secular components" and that "those are what are being regulated" (a meeting of the second prong's requirements), "concern over any excessive church-state entanglement that might result from regulating those secular

functions is diminished." 426 U.S. 736, 762. The *Pacific Press* Court refined the *Roemer* guideline in the context of enforcement of the Civil Rights Act, and found no reason to be concerned about an "excessive entanglement" because of a finding that the Civil Rights Act applied to an employer which was owned by a church, given satisfaction of the second prong (that only segregable secular activities were being regulated), because the administration of the Civil Rights Act does not involve continuous supervision of the employer's activities on the part of the government. This is so because the Federal Act, like the Minnesota Human Rights Act, gets the government involved only when a charge is filed. The "supervision" is done by a third party—employees and/or members of the public who get the government involved only if they make complaints. The Hearing Examiner is persuaded that the same factors control resolution of the "third prong" of the test in the situation before him. Since the employer is an operation that has "segregable secular components" (in fact, the whole essence of its business *is* secular") and it is those components that are being regulated by the imposition of the Human Rights Act, there is less concern over whether applying the Act to the Respondents excessively entangles the government with a religion. And, as earlier mentioned, no government supervision is involved (absent complaints from the public or employees).

The Hearing Examiner is aware that the Supreme Court has recently decided an establishment clause case involving whether the City of Pawtucket, Rhode Island, could place a creche (nativity scene) in a municipally-sponsored Christmas display, which featured Santa Claus and other secular, commercially-oriented symbols promoting the hol-

iday. A possible departure from the *Lemon v. Kurtzman* test appears in the Court's syllabus, preceding Chief Justice Burger's majority opinion, stating that the Court "will not be confined to any single test or criterion in this sensitive area . . . .", *Lynch v. Donnelly,* Case No. 82-1526, 52 L.W. 4317, 3/5/84. However, the Hearing Examiner is not persuaded that the *Lemon v. Kurtzman* analysis, also authored by the Chief Justice, should not apply to this case. In addition, the Court stated at 52 L.W. 4321 that "not every law that confers an 'indirect, remote or incidental' benefit upon religion is, for that reason alone, constitutionally invalid", citing *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973). Thus, even if the regulation of the Respondents' Clubs under the Human Rights Act confers a benefit upon the religion of secular humanism (an assertion not proven on the record), the argument the Respondents have advanced in their attempt to obtain their holding that the Act's provisions constitute a establishment of religion, the Pawtucket creche case can give them little comfort. For this reason, and those outlined above, the Hearing Examiner is unable to declare that the operation of the Human Rights Act's provisions in the employer's Clubs is an impermissible establishment of religion under the United States and Minnesota Constitutions.

## FREE EXERCISE OF RELIGION

The Respondents have argued that, if the Hearing Examiner were to find violations of the employment discrimination and public accommodation sections of the Minnesota Human Rights Act in their conduct regarding any of the Charging Parties, that said conduct is still protected as the free exercise of their rights to speak, associate

and exercise their religion under the United States and Minnesota Constitutions. While recognizing that the Hearing Examiner lacks the jurisdictional power to declare unconstitutional any provision of the Act, the Respondents argue, and the Hearing Examiner agrees, that he may rule that enforcement of the Act's provisions, or any one of them, is unconstitutional as applied to the Respondents if it impermissibly interferes with the individual Respondents' First Amendment (and therefore, Fourteenth Amendment) rights under the United States Constitution or with the guarantees granted to them under Article I, § 16 of the Minnesota Constitution. The Hearing Examiner has carefully considered the record before him, and compared it to the cases interpreting the Minnesota and comparable federal statutes, and finds that no such interference exists regarding the instances where he has found discrimination violative of the Minnesota Human Rights Act.

The Hearing Examiner limits his analysis herein to the question of whether the instrusion of the Minnesota Human Rights Act's unfair discriminatory practices in employment provisions and public accommodations provisions impermissibly (unconstitutionally) restrict the Respondents' rights to freely exercise their religion. This is because the "speech" which the Respondents have used in connection with the charges litigated in this proceeding, and the "association" the Respondents seek to protect both merge into and relate back to the Respondents' religious beliefs and are only manifestations of their exercise thereof. The forms of "speech" utilized by the Respondents and scrutinized in this case are all based on their religious beliefs. The record contains Biblical justifications for why the Respondents make all of the pre-employment in-

quiries for which they seek constitutional protection, for why they failed to promote or retain persons in their employment and for why they proselytize their religious views among employees and persons who use their Clubs. The "freedom of association" argument was made only with respect to the non-promotion of persons who do not embrace the same religious beliefs and practices of the individual Respondents, and with respect to a refusal to hire or retain employees who are "antagnostic to the Gospel". These arguments all merge into and relate back to the Respondents' religion. Therefore, it is appropriate to analyze only the Respondents' claim that their employment practices are protected under the free exercise clause.

It is clear that the First Amendment prohibits the government from regulating the Respondents' religious *beliefs*. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). It is also clear that no law will withstand constitutional scrutiny if it singles out any religion for adverse treatment. *McDaniel v. Paty*, 435 U.S. 618 (1943). The Minnesota Human Rights Act does neither of these things.

The difficulties arise, and scores of cases have addressed this general situation, where a facially-neutral regulation (such as the Human Rights Act) has an impact that conflicts with conduct that is required or forbidden by religion. When this happens, as has happened here, the general rule is that persons asserting that the law conflicts with the practice of their religion are granted an exemption from the conflicting provisions of the laws, unless the State can demonstrate an overriding public or governmental interest that cannot be achieved in any other way than enforcement which also regulates the religious con-

duct. *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Sherbert v. Verner,* 374 U.S. 398 (1963).

While the freedom to believe is protected as an absolute right, a long line of United States Supreme Court cases has established that an individual's right to practice his religion may be subjected to reasonable government regulation. The justification for such regulation comes under the general police powers of the state, the exercise of which have been recognized as necessary to the functioning of an orderly society and the protection of its citizens. The leading case for this proposition is *Cantwell v. Connecticut,* 310 U.S. 296 (1940), which involved the right of Jehovah's Witnesses to practice their religion by soliciting and proselytizing (attempting to convert their listeners). At 310 U.S. 303-4, the Court stated:

> "The constitutional limitation of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organizations or forms of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the exercise of the chosen form of religion. Thus, the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. . . ."

The *Cantwell* Court cited two earlier cases which articulated the same general proposition that the government may regulate religious conduct under its police powers, *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1879) and *Davis v. Beason,* 133 U.S. 333, 10 S.Ct. 299 (1890). These cases dealt with whether statutes in Utah and Idaho, respectively, outlawing polygamous marriage impermissibly interfered with the religious practices of the Church of Jesus Christ of the Latter Day Saints (Mormons). The *Reynolds* Court, at 25 L.Ed. 250, stated that it was the intent of the founding fathers (citing the writings and speeches of Thomas Jefferson and James Madison) that "Congress was deprived of all legislative power over mere opinions, but was left free to reach actions which were in violation of social duties or subversive of good order". Given this, the court stated:

> "Can a man excuse his practices to the contrary (practice polygamy) because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." 25 L.Ed. at 250-51.

The *Davis* Court, writing eleven years later, added:

> "Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices".

The above-cited *Sherbert v. Verner,* and *Wisconsin v. Yoder* decisions recognize that the state can issue neutral regulations which have the effect of interfering with the

religious practices of our citizens. Both decisions held for the persons who asserted that the government's regulations impermissibly infringed their right to freely exercise their religion. *Sherbert* involved a woman who was denied unemployment benefits because she refused to accept work that was "suitable" except for the fact that it required that she work on Saturday, in violation of her religious beliefs as a 7th-Day Adventist. *Yoder* was a case involving whether followers of the Old Order Amish faith could refuse to send their children to public schools after they finished the 8th grade, as required by their religion, in violation of a Wisconsin Statute that compelled school attendance until age 16. Relying on these two cases, and other Supreme Court decisions, Courts have developed a general test (which the Hearing Examiner has found useful in analyzing this case) to determine whether a neutrally based statute violates the free exercise clause. The first part of the test, articulated in a recent Federal decision, involves a three-step inquiry:

> "(1) it must be determined whether a legitimate religious belief is held by the plaintiff (or, in this case, the Respondents);
>
> (2) it must be determined whether free exercise rights would be either burdened or inhibited by exercise of the state's powers; and
>
> (3) it must be determined whether burdening of the individual rights is justified by a compelling state interest."

*New Jersey-Philadelphia Presbytery of Bible Presbyterian Church v. New Jersey Board of Higher Education*, 514 F.

Supp. 506 (1981). As to part (2) of the above-noted test, it is generally recognized that "an essential element of a claim under the free exercise clause is some form of governmental coercion of actions which are contrary to religious belief." *Sequoyah v. Tennessee,* 480 F.Supp. 608 (1979).

In one of the few cases involving a claim that imposition of a statute regulating discrimination in employment upon an employer violated the free exercise rights of the employer, *EEOC v. Pacific Press Publishing Association,* 676 F.2d 1272 (9th Cir. 1982), the Court adopted a refinement to part (3) of the above-quoted test that had been used by another Circuit in a similar case (where an employer claimed that the Civil Rights Act's employment discrimination provisions interfered wth its free exercise of religion rights). The other case, *EEOC v. Mississippi College,* 626 F.2d 477 (5th Cir. 1980), cert. denied; 101 S.Ct. 3143 (1981) involved whether the employment of certain faculty members at a church-owned school was covered under the Federal Civil Rights Act. Both cases relied on *Sherbert* and *Yoder* for guidance in developing the following standard:

> "In determining whether a neutrally based statute violates the free exercise clause, courts must weigh three factors:
>
> (1) the magnitude of the statute's impact upon the exercise of the religious belief;
>
> (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief; and

(3) the extent which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state". 676 F.2d at 1279

The one recent United States Supreme Court case the Hearing Examiner has found involving a claim by an *employer* that his rights of free exercise of religion were violated by a facially-neutral government regulation, *United States v. Lee,* 455 U.S. 252, 102 S.Ct. 1051 (1982) does not involve an anti-discrimination statute but, nonetheless is parallel to this case in several ways and has provided guidance to the Hearing Examiner. Mr. Lee is a farmer and carpenter who belongs to the Old Order Amish religion. In the course of his business, he employs Amish farm workers and carpenters. Lee applied for an exemption to the requirement that he make social security contributions to the government. The social security laws contain an exemption for self-employed Amish and members of other religions who believe that it is sinful not to provide for their own elderly and needy members and therefore are religiously opposed to the national Social Security System. The Supreme Court denied an exemption to Lee, holding that while there is a conflict between the Amish faith and the obligations imposed by the social security system, not all burdens on religion are unconstitutional. The Court held that a state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. 455 U.S. at 256-258. The Court added that it would be difficult to accommodate the social security system with the myriad exceptions flowing from a wise variety of religious beliefs such as the Amish. After distinguishing Lee from the situation it faced in *Wisconsin*

*v. Yoder,* 406 U.S. 205, the Court stated that "there is no principled way for purposes of this case to distinguish between general taxes and those imposed under the Social Security Act. The tax system could not function if denominations were allowed to challenge it because tax payments were spent in a manner which violates their religious beliefs. Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with payment of taxes affords no basis for resisting the tax". 455 U.S. at 259-260. The opinion also deals with the fact that Congress accommodated, to the extent compatible with the comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system by granting an exemption to such persons who were self-employed. The Court emphasized that "when followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes that are binding on others in that activity". In noting that granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the non-Amish employees, the Court held that the tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress explicitly provides otherwise. 455 U.S. at 260-61.

The *United States v. Lee* casse has a background that closely resembles this case. The chief distinction is that the statutes involved, the Federal Social Security laws, regulate a different aspect of society than those which come under the Minnesota Human Rights Act. However, both

cases involve statutory exemptions which the parties seek to fit because of their religious beliefs. Both involve parties whose religious beliefs conflict with the statutory scheme. The Hearing Examiner concludes that the *United States v. Lee* decision implies that the Respondents in this case must yield to the statutory scheme because, among other reasons, granting them an exemption would lead to a situation where it would be an excessive burden on the state to attempt to accommodate the Human Rights Act's regulatory scheme to the "myriad" exceptions flowing from a wide variety of religious beliefs such as the Respondents' "Born-Again" Christianity. As the Supreme Court implies in *United States v. Lee,* granting an exemption would operate to impose the employer's religious faith on his employees. In order to protect the State's interest in eliminating discrimination in employment, the Human Rights Act scheme designed to effectuate that compelling interest must be uniformly applicable to all, except as the Legislature has provided otherwise. And it has already been held that the Respondents do not qualify for the Human Rights Act's exemption from employment discrimination regulation that has been granted to "religious corporations". A further implication of the *Lee* decision is that since the Minnesota Human Rights Act is intended to bind all of the State's employers, and the Respondents have chosen to enter into a commercial activity where they have become employers covered under the Act, they may have to modify practices which they would otherwise undertake as matters of conscience and faith as long as they choose to continue in that commercial activity.

A later Supreme Court pronouncement on the free exercise clause is found in the case of *Bob Jones University*

*v. United States,* 103 S.Ct. 2017 (1983), where the court denied tax-exempt status to a religiously-owned college that denied admission to applicants who refused to declare their antagonism to mixing of the races through interracial dating and marriage. While this case does not involve race discrimination, and deals with employment discrimination instead of discrimination in education, the last paragraph of the court's opinion provides guidance in the sense that it recognizes that a fundamental, overriding governmental interest can outweigh a person's right to exercise his religious beliefs. It also sets some general standards of inquiry, that is, whether the interests asserted by the party can be accommodated with a compelling governmental interest, and whether "no less restrictive means" are available to achieve the governmental interest:

> "The governmental interest at stake here is compelling. As discussed in Part II (B), supra, the government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed with offical approval for the first 165 years of this Nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest. See *United States v. Lee, supra,* 455 U.S. at 259-260, 102 S.Ct. at 1056; and no 'less restrictive means', see *Thomas v. Review Board, supra,* 450 U.S., at 718, 101 S.Ct. at 1432 are available to achieve the governmental interest." 103 S.Ct. at 2035.

Returning now to the tests developed by the Courts based on *Sherbert* and *Yoder*, and in light of the other decisions noted herein, the Hearing Examiner will endeavor to further analyze the Respondents' free exercise claim.

There is no dispute that the Respondents' religious beliefs which they rely upon to justify their actions are legitimate and sincere. The Complainant has stipulated to this, and the Hearing Examiner is similarly convinced. Arthur Owens and his two Vice Presidents are sincere individuals who truly believe that they are following God's direction, as expressed in the Bible, when they ask religious-based questions designed to uncover "what kind of person" they are speaking to. They are truly sincere in their belief that they are compelled by God to evangelize and proselytize to everyone in order to help guide the listeners into a way of life and belief system that God commands human beings to follow.

There is also no doubt that the individual Respondents will be burdened or inhibited in the practice of their religion if they must adhere to the Minnesota Human Rights Act and subsequently cease and desist from asking religious-based questions in employment interviews, from asking questions pertaining to marital status, and from promoting only persons whose religious views are compatible with theirs.

What is left to resolve is the question of whether the State's interest in enforcement of the Minnesota Human Rights Act in all places of employment not otherwise exempted by the Legislature from its coverage outweighs the burden such enforcement would place on the Respondents' exercise of their religious beliefs.

In the above-noted case of *EEOC v. Pacific Pres, supra,*

the 9th Circuit considered first whether the Federal Civil Rights Act Section on prohibited discriminatory practices in employment reflected a compelling state interest, and found that it did. And, citing *U.S. v. Lee*, the Court held that the government's compelling interest in assuring equal employment opportunities justified an impact on the religious interest so heavy that it caused the employer to violate its sincerely held religious beliefs. The 7th-Day Adventist belief involved was that its members had to resolve their internal disputes under church jurisdiction and that it was forbidden to file a civil suit against another member of the church. The editorial secretary who filed the EEOC charge (*Pacific Press* is a retaliatory discharge case) was a 7th-Day Adventist (as were all employees of Pacific Press). The Court, after noting the United States Senate debates preceding passage of the 1964 Civil Rights Act and subsequent amendments thereto (see 676 F.2d 1276-77), said:

> "By enacting Title VII, Congress clearly targeted the elimination of *all* forms of discrimination as a 'highest priority'. *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 47; S.Ct. 1011, 1019 (1974). Congress' purpose to end discrimination is equally if not more compelling that other interests that have been held to justify legislation that burdened the exercise of religious convictions." 676 F.2d at 1281.

The *Pacific Press* Court also noted that upholding the government's interest in this area was a consideration more important than *whatever* burden would be placed on an employer's religion, even if infringement of the anti-discrimination statutes would result in severe economic burden for the employer. This holding is important because it im-

plies that even if Sports and Health had shown that it would lose money by elevating into management persons who were not "Born-Again" Christians, such a consideration is probably immaterial. It also implies that if the imposition of the Human Rights Act's scheme on their establishment is so at variance with their religious beliefs that they have to choose between giving up the practice of their religion and closing their business then the business may have to close down. (Pacific Press had argued that the enforcement of the Civil Rights Act's provisions against any of its employment practices was unconstitutional). 676 F.2d, at 1278. See also, *United States v. Lee, supra.* The Ninth Circuit, after weighing the above-noted considerations, concluded that:

> ". . . The compelling public interest embodied in Title VII simply outweighs Press' assertion that the excessively religious nature of its activities or the exercise of its particular religious belief prohibiting civil suits immunizes Press' employment policies from E.E.O.C. regulations." 721 676 F.2d at 1281.

In considering the implications of the *Pacific Press* case, the Hearing Examiner also notes that the employer was a religious publishing house, whose "essence" is far less secular than the Sports and Health Clubs. This distinction is important because the charge in *Pacific Press* was sex discrimination, not discrimination because of religion. Religion was not reached in *Pacific Press* because the employer was a "religious organization" under the Civil Rights Act, but the Hearing Examiner has already found that Sports and Health does not qualify for the similar exemption granted by the Minnesota Act.

The Hearing Examiner concludes that in passing the Human Rights Act, the Legislature clearly targeted the elimination of *all* forms of discrimination as a highest priority, and that the legislative purpose to end discrimination in this State is equally if not more compelling than the interests that have been held to justify legislation that burdened the exercise of religious convictions in other areas. Therefore, compelling the Respondents to adhere to the Human Rights Act does not, in any of the instances ordered herein, unconstitutionally interfere with the free exercise of religious rights enjoyed by Respondents Owens, Crevier and Larson.

Another recent case, *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio,* 699 F.2d 303 (6th Cir. 1983) analyzed the nature (or magnitude) of a regulation's impact on the observance of religious beliefs. The Hearing Examiner believes that case to be instructive here. The court first decided whether the impact of a zoning regulation that would force the congregation to refrain from building a kingdom Hall on a piece of property it had earlier purchased placed a burden on "fundamental tenets" *(Yoder)* or "cardinal principles" *(Sherbert)* of the congregation's beliefs. It has been stipulated by the state herein that requiring the Respondents to follow the Human Rights Act would burden them in such a way because it interferes with "fundamental tenets" or "cardinal principles" of their beliefs. The *Lakewood* Court, citing *Sherbert v. Verner, supra,* stated:

> "If an ordinance infringes a fundamental right, then it must be justified by a compelling governmental interest employing the *least restrictive means* to achieve its purposes." 699 F.2d at 309.

This test was also relied upon by the United States Supreme Court in *Bob Jones University, supra,* citing *Thomas v. Review Board,* 450 U.S. at 718, 101 S.Ct. at 1432. The Hearing Examiner concludes that there is no lesser restrictive means to achieve the Legislature's purpose of eliminating discrimination in this case than applying the provisions of the Human Rights Act to all aspects of the business of the Sports and Health Clubs. This is because he sees no principled way to exempt this employer on religious grounds that would not open the door to a myriad of employers claiming that they, too, should be allowed to violate the Human Rights Act because of sincerely held religious beliefs. See *United States v. Lee, supra.*

The case of *Grosz v. City of Miami Beach. Florida,* 721 F.2d 729 (11th Cir. 1983), involves another aspect of whether a city's zoning ordinances an infringe upon the free exercise of religion, in this case effectively shutting down the religious activities of a small sect of Jews who worshipped twice daily at a "shul" in the home of their spiritual leader, Mr. Grosz. The Court upheld the City's zoning ordinance despite the impact on Grosz's exercise of his religion. The Court's opinion provides further guidance to the Hearing Examiner, and he has used it as a model in trying to determine whether the Respondents' free exercise of religion rights have been impermissibly infringed.

The Court adopted two threshold tests of constitutionality: (1) whether the government regulation affects religious *conduct* without regulating religious beliefs and opinions, and (2) whether the law has both a secular purpose and a secular effect. It is clear that only the Respondents' conduct of their religion would be affected by imposition of the Human Rights Act into their Clubs' operation.

The Human Rights Act is not based upon a disagreement with any religion's tenets or practices, nor is it aimed at impeding religion. 721 F.2d at 733. As to the second threshold inquiry, the *Grosz* case hold that a free exercise of religion violation arises if the "essential effect" of the government's action is to influence negatively the pursuit of religious activity or the expression of religious belief. The Court adds: "this is not say that any government actions significantly affecting religion fail this threshold test. Rather, any nonsecular effect, regardless of its significance, must be only an incident of the secular effect". 721 F.2d at 734.

The Hearing Examiner has already held, with respect to whether enforcement of the Human Rights Act's provisions on the Respondents constituted an establishment of religion, that the primary thrust of the Act, as it applied to the Respondents' operation, was secular. Therefore, the "second threshold" has been crossed. Of further significance here is that the Court allows for the law's effect on religious practice to be *significant* so long as the effect arises only incidentially from application of the law. That is precisely the situation in this case. The effect of interfering with the Respondents' exercise of their religion is only incidental to the imposition of a statutory scheme that establishes a regulatory system over the secular aspects of their business.

The *Grosz* Court also weighed the burden on the government that would result from imposing no burden on the religious conduct. In so doing, it considered the impact of a specific, religious-based exception upon the government's policy objectives. Specifically, would any exception be workable? And, are potential problems in admin-

istration and enforcement so great as to necessitate blanket application of the law? This inquiry is an application of the "least restrictive means" test applied in the *Lakewood* case discussed above, based upon the case of *Thomas v. Review Board*, 450 U.S. 707 (1981) and reaffirmed by the Court in the *Bob Jones University* case. The Hearing Examiner concludes that an excessive burden would be placed upon the Complainant if a religious exemption based upon free exercise rights were granted to the Respondents here, for reasons stated in the above discussion of the *Lee* and *Lakewood* cases.

At 721 F.2d 737, the Court states that "If avoiding the burden on government rises to the *very upper ranges of government interest*, a free exercise challenge will fail". (Emphasis supplied.) The Hearing Examiner finds that it is necessary to avoid the myriad of exceptions to the coverage of the Human Rights Act that would arise based upon religious beliefs if the Respondents' free exercise challenges upheld in this case. It is likewise necessary to avoid a situation which could well lead to a breakdown of a state-wide system enforcing anti-discrimination laws in employment due to an impossibility of effective administration. For instance, what standards would be used to determine whose religious claims were valid and whose were feigned? In order to avoid such results, the need to universally enforce the provisions of Minn. Stat. § 363.03, subd. 1 and 3 rises to the "very upper ranges of government interest" within the meaning of the *Grosz* case and is a fundamental interest that overrides the Respondents' right to freely exercise their religion.

The *Grosz* Court then arrives at the "balancing test" that runs through all of the free exercise cases:

> ". . . we must then balance the cost to the government of altering its activity to allow the religious practice to continue unimpeded against the cost to the religious interest imposed by the governmental action". 721 F.2d at 738.

This is what the Hearing Examiner has attempted to do in deciding this case. One of the "balancing test" factors is whether there is any principled way to limit an exception's costs (to the government) just to the harm (to the public interest) it would create in this case. 721 F.2d at 738; *U.S. v. Lee*, 455 U.S. 252, 259-60. The Hearing Examiner finds, for reasons stated in the two preceding paragraphs, that there is no such way. In this case, a religious-based exception would clearly and substantially impair the Legislature's policy objective of eradicating discrimination in employment. Counsel for the Respondent urges the Hearing Examiner to consider the fact that, unlike Mr. Grosz, who was still allowed to conduct his religious services in areas constituting 50 percent of the land mass of Miami Beach if the zoning ordinance in question was enforced against him, Owens, Crevier and Larson have no where to go to practice their religion if the Human Rights Act is enforced against them in their Clubs. The Hearing Examiner, while sympathetic to their plight, is not sufficiently persuaded by this argument. The important objectives underlying the Minnesota Human Rights Act and the degree of infringement of those objectives caused by allowing the Respondents to continue their religious-based conduct in the work place puts too heavy a weight on the government's side of the balancing scale to hold that requiring Respondents Owens, Crevier and Larson

to obey the Act's provisions impermissibly infringes on their rights to free exercise of their religion.

## DAMAGES AND OTHER CONSIDERATIONS

The parties have stipulated that they will attempt to resolve the question of appropriate damage amounts only if the Hearing Examiner were to find that the Respondents engaged in unfair discriminatory practices under the statute which did not have constitutional protection. If the parties cannot stipulate on damages respecting the Charging Parties noted in the Orders, the Hearing Examiner will schedule a hearing on the subject. He has determined appropriate compensation for Miriam Cameron for reasons given in the "Public Accommodations" portion of this Memorandum.

In the Conclusions of Law and Orders issued regarding this case, the Hearing Examiner has stopped short of concluding that Arthur Owens, Marc Crevier and Forest Larson have "aided and abetted" their corporation, Sports and Health Club, Inc., to engage in any practices forbidden by the Human Rights Act. The Hearing Examiner so ruled because the statute, Minn. Stat. § 363.03, subd. 6, requires such "aiding and abetting" to be intentional. After considering the entire record, the Hearing Examiner is unable to conclude that the individual Respondents intended to violate the Minnesota Human Rights Act when they took the actions that the Hearing Examiner has since found in violation of the Act. His ruling that the Respondents' actions were not entitled to constitutional protection is in admitted conflict with the sincere religious beliefs of the Respondents. For the Hearing Examiner to hold that Owens, Crevier and Larson *intentionally* aided

or abetted their corporate entity to engage in an activity that they knew was violative of the Human Rights Act would be tantamount to holding that the religious beliefs upon which their actions were based were less than sincere. The very basis of the Respondents' actions leading to the charges litigated in this hearing process is that they are following the word of God and acting in a fashion that is directed by God. The Hearing Examiner accepts, and the State concedes, that their beliefs in this regard are beyond question. It is, therefore, inappropriate to conclude that the Respondents should he held to have "aided and abetted", that is, possessed a shared intent to violate the Human Rights Act. To the extent the Act's dictates are in conflict with the Respondents' religious beliefs, the Respondents have followed their beliefs. The Hearing Examiner has held that they have violated the Act in certain particulars, and that the Respondents' actions based on their beliefs are not protected by the United States and Minnesota Constitutions in those particular situations. Since the actions have been based upon the Respondents' sincere and unquestioned religious beliefs, however, it is inappropriate to "punish" them beyond awarding compensation to the Charging Parties against whom the Respondents have wrongfully discriminated. To insert another basis for compensatory damages, "aiding and abetting", would go beyond the Statute's intent because the basis for the Respondents' actions lies not in their intent to break the law but in their belief that their United States and Minnesota Constitutions protected them from breaking the law, when such actions were grounded in sincere religious beliefs. Therefore, the additional charges of "aiding and abetting" have been dismissed.

Minn. Stat. § 363.071, subd. 2 also authorizes that award of punitive damages to any party the Hearing Examiner has held to be "aggrieved" by the Respondents' violations of the Human Rights Act. The Statute provides that such damages be awarded pursuant to Minn. Stat. § 549.20. Subdivision 1 of that Statute requires that the Respondents' acts show a "willful indifference ot the rights . . . of others" by "clear and convincing evidence". The Hearing Examiner concludes that the record in this matter makes no such showing. As stated in the preceding paragraph, the Respondents are sincere, deeply religious men. It is their belief that every person should, and must, follow God in the same general manner they do. or that person will not be saved. They believe it is the Lord's wish that they do not associate with persons who do not embrace the same beliefs, and when a person's action has shown the Respondents that a person is "antagnostic" to God, the association has been terminated. While such actions may have been "indifferent" to the rights of others (which rights the Hearing Examiner has recognized by upholding a variety of the charges herein), that "indifference" has not been shown to be *willful* within the meaning of the punitive damages statute. In the context of this case, the Hearing Examiner believes that a showing of willfulness requires proof that the Respondents acted intentionally with the knowledge that they were violating the Human Rights Act *and* were engaging in activities that were not protected under their rights to free exercise of religion. As subdivision 3 of § 549.20 points out, one factor that "justly bears on the purpose" of punitive dammages, is the degree of the (Respondents) awareness that they were engaged in wrongdoing. Since the Respondents'

were following what they sincerely believe to be God's commands, and believed that following those commands in conflict with the Human Rights Act was activity that had constitutional protection, assessment of punitive damages are concluded to be inappropriate.

Minn. Stat. § 363.071 was amended, effective August 1, 1981, which amendment authorized the Hearing Examiner to include damages for mental anguish or suffering in an award to an aggrieved party who has suffered discrimination. Therefore, the above Orders include the award of damages for mental anguish and suffering as part of the compensatory damages to be awarded to those Charging Parties whose causes of action arose after August 1, 1981.

With respect to other arguments presented at the hearing and in the briefs filed by the Respondents herein, the Hearing Examiner has considered all arguments advanced. He has analyzed and commented in detail on the arguments he believes to be most meritorious. The argument that the employment decisions made regarding the Charging Parties come within the Respondents' inherent or recognized "management rights" has been given little weight because the charges do not turn on whether the Respondents could discharge or refuse to hire or promote the Charging Parties. The inquiry in this proceeding is whether the hirings, firings and refusals to promote had an *illegal* basis (sex, religion or marital status) under the Human Rights Act. The Employer's right to fire or refuse promotion to employees who "bad mouth" them is not questioned—the problem with that defense in this case is that the Hearing Examiner has found it to be pretextual.

The Respondents have also argued that imposition of

the Human Rights Act's anti-discriminatory scheme in their work place would constitute a "prior restraint" against them of their constitutionally-guaranteed right to speak freely. This argument is unpersuasive. The Human Rights Act has already properly and constitutionally abridged the Respondents from asking for certain kinds of information or inquiry into areas of people's lives, and their taking action based on what they find out. This activity, even if based on sincerely held religious beliefs, is forbidden in the context of an employee-employer relationship. The Respondents are asking for an unbridled freedom to speak and act in any way their consciences dictate, even if the result is in conflict with the Human Rights Act. As he has explained in detail above, the Hearing Examiner concludes that the Respondents must yield when such conflicts arise.

Three of the cases most heavily relied on by the Respondents, *Wisconsin v. Yoder, supra, Thomas v. Review Board, supra,* and *Sherbert v. Verner, supra,* all involve different governmental interests than the case before the Hearing Examiner. In *Yoder,* it was the interest of the State of Wisconsin in the integrity of its public education system. *Thomas* and *Sherbert* were unemployment compensation cases where the interest was the integrity of State systems of financing a benefit program. In these cases, the states were made to yield, or "accommodate" to the free exercise of religion of the individuals involved—an Amish farmer who was shown on the record to be able to educate and develop his children in a way that fulfilled the State's purpose in compulsory school attendance to age 16, a man whose religion forbade him from aiding the Viet Nam war effort by assisting in the manufacture of gun turrets, and a woman whose religion forbade Sunday work. In this case, for reasons stated under the "free exercise" heading, the

Hearing Examiner is persuaded that no such accommodation, compromising the State's interest in having a work place free from discrimination, can be made to allow the Respondents to totally impose their religious practices on the commercial activity in which they have chosen to engage.

The Hearing Examiner emphasizes that his decisions in this matter are not intended to interfere with the Respondents' religious beliefs. It should be noted that many of the actions taken by the Respondents herein intrude on the religious beliefs of their employees and/or those whom they have considered and rejected for employment. In some instances, the Respondents have based their actions on the marital status or sex of the persons involved, intruding into the personal lives of their employees or prospective employees and making presumptions about those persons' religious and/or ethical standards weighed against those the Respondents impose on themselves. For the reasons detailed above, this practice of the Respondents has resulted in the taking of actions that are against the Human Rights Act and not protected by the United States or Minnesota Constitutions.

The decisions reached by the Hearing Examiner have not been approached lightly. He has read the entire record, including the Bible passages referred to in the Respondents' testimony and the extensive supplementary material which they have used to build the philosophical foundation of the business operation. The Respondents have ably shown how their job descriptions, personnel policies, and conduct of the Clubs' operations relate back to and are based upon Scripture. In this, they have succeeded in persuading the Hearing Examiner that all of the decisions regarding the Charging Parties are connected to the exercise of their re-

ligious beliefs. However, such a showing cannot be determinative of a case involving a conflict between a government interest of the very highest order (such as the Hearing Examiner has found in enforcement of the Minnesota Human Rights Act) and the Respondents' religiously-based principles. As the trial Court pointed out in *EEOC v. Pacific Press Publishing Association,* 482 F.Supp. 1291 (N.D. Calif. 1981):

> "Particularly with regard to its formulation of a broad free exercise defense based on its assertion that all its activities constitute religious-based conduct, (Press) has misconceived who it is that must make the decisions regarding any conflict between government regulation and the free exercise of religion. In this nation, religious freedom is recognized by the secular adoption of a constitution without which religious freedom would have no meaning. This same document has conferred on the courts the power and responsibility to construe its provisions and prevent the violation of the individual rights it protects. Without doubt, the maintenance of an ordered society can at times does conflict with the practice of certain religious beliefs. In such instances, the courts, and not the (church) involved must weigh whether the societal right intrudes on religion in an unconstitutional, rather than a theological sense. It is with this principle in mind that the Court finds no violation of (Press's) free exercise of religion." 482 F.Supp. at 1309.

As was done by the Courts in the cases relied upon the Hearing Examiner, he has endeavored to balance the cherished interests of the Respondents in free exercise of

their religion against the interests the public has in enforcing the Minnesota Human Rights Act in areas that touch the lives of all of us, employment and public accommodations. In nearly all instances that are before him respecting the Charging Parties in this case, the Hearing Examiner has found the public's interest, as expressed in the Human Rights Act, to be the stronger consideration.

R.C.L.

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## APPENDIX C

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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
400 SUMMIT BANK BUILDING
310 FOURTH AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55415
(612) 341-7600

May 9, 1984

Kathryn R. Roberts, Acting Commissioner
Minnesota Department of Human Rights
5th Floor, Bremer Tower
Seventh Place and Minnesota Streets
St. Paul, MN 55101

RE: State, by McClure, et al. v. Sports and Health Club, et al.

OAH Docket No. HR-82-005-RL.

Dear Commissioner Roberts:

In reviewing the FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS issued in the above-

entitled matter on April 26, 1984, I have noted numerous errors in spelling and usage and several areas where editorial clarification is required. I also am adding language at the end of one paragraph in the final section of my Memorandum to add an additional reason for not holding Respondents Owens, Crevier and Larson liable for aiding and abetting Respondent Sports and Health Club, Inc., in its violations of the Human Rights Act. The purpose of this letter is to call those portions of the document which are being changed to your attention. I wish to emphasize that these editorial changes do *not* involve matters of substance (with the possible exception of the additional language on aiding and abetting) and do not extend the appeal period for either party in this case.

The changes are:

1. At page 3, last line in Finding of Fact No. 3: "what kind a person" to "what kind of person".
2. At page 4, fifth line from bottom in Finding of Fact No. 7: change "at Normandale and Bloomington " to "at Normandale in Bloomington".
3. At page 7, line 3 in Finding of Fact No. 14: change "Clubs" to "Club".
4. At page 9, fourth line from end of Finding of Fact No. 19: put word "joint" between "a" and "wedding".
5. At page 12, last line, first paragraph of Finding of Fact No. 28: change "Complaints" to "Complainant's".
6. At page 12, second to last line of Finding of Fact No. 29: change "Chargin" to "Charging".
7. At page 13, fifth line from bottom of Finding of

Fact No. 32: insert word "the" between "and" and "three".

8. At page 20, second line in first ORDER: change "Serverin" to "Severin".
9. At page 21: (a) in paragraph (1), insert "in employment" after "Discriminating"; (b) in paragraph (2), insert "in employment" after "Discriminating"; (c) in paragraph (3), insert "in employment" after "Discriminating".
10. At page 23 first paragraph, line 5: insert "Affairs" after "Community".
11. At page 23, fourth paragraph, line 5: change "Ruling" to "ruling".
12. At page 28, line 4: change "Similarly" to "summarily".
13. At page 30, second complete paragraph, line 9: change "Acts" to "Act".
14. At page 34, first line under "STATUTORY CHARGES — PUBLIC ACCOMMODATIONS": CHANGE "relevent" to "relevant".
15. At page 36, line 3: insert "which" between "accommodations" and "are".
16. At page 40, third line from bottom: change "questionning" to "questioning".
17. At page 41, first line: change "intimated" to "intimidated".
18. At page 41, first full paragraph, line 11: strike "a" at end of line.
19. At page 41, seventh line from bottom: change "work out" to "workout".
20. At page 41, sixth line from bottom: change "a" to "an".

21. At page 45, first full paragraph, line 7 and last line of fourth full paragraph: change "§ 363.01, subd. 1" to "§363.03, subd. 1".
22. At page 49, first line under "Religious-based questions before hiring" subheading: change "asked" to "ask".
23. At page 49, last full paragraph, line 10: change "serivce" to "service".
24. At page 50, fifth line from end of paragraph preceding "Marital status and sex-based questions": insert "(the prospective employees')" between *"their"* "*their*" and "own".
25. At page 51, first full paragraph, line 10: change "respondents" to "Respondents".
26. At page 54, second paragraph, line 6: change "if" to "of".
27. At page 55, bottom paragraph, line 3: change "it" to "them".
28. At page 55, bottom paragraph, line 5: change "its" to "their".
29. At page 55, last line: change "exeception" to "exception".
30. At page 56, line 11: add ", and for 'religious corporations,' " after "qualifications".
31. At page 57, second paragraph, line 10: change "§ 363.012" to "§ 363.12".
32. At page 57, statutory quotation, line 6: change "menances" to "menaces".
33. At page 59, line 9: remove quotation marks after the word "secular".
34. At page 59, first full paragraph, line 3: remove the comma after the word "Island".

35. At page 61, last line of first quotation: change "permissable" to "permissible".
36. At page 64, line 6: strike "non-Amish".
37. At page 64, third line from bottom: replace "that is," with "such as".
38. At page 65, last line in second full paragraph: change "comands" to "commands".
39. At page 66, last line of second quotation: strike "721,".
40. At page 67, line 4: change "State" to "state".
41. At page 67, first full paragraph, line 8: change "state" to "State".
42. At page 67, last paragraph, line 2: change "an" to "can".
43. At page 68, fifth line from bottom: insert "were" between "challenges" and "upheld".
44. At page 69, ninth line from end of FREE EXERCISE OF RELIGION section: change "no where" to "nowhere".
45. At page 70, add this paragraph after the paragaph ending with ". . . have been dismissed.":

"Another reason for not holding Respondents Owens, Crevier and Larson liable for "aiding and abetting" Respondent Sports and Health Club, Inc. in the violations of the Minnesota Human Rights Act which the Complainant has proven in this case is that the individual Respondents *are*, in effect, the corporation. Respondents Crevier and Larson (and possibly Owens), and no one else, together own 100 percent of the stock of Sports and Health Club, Inc. The record also implies that they own 100 percent of the assets of the corporation. "Aiding and

abetting" requires that the perpetrator of the illegal conduct be some person or entity separate from those who have "aided and abetted" the perpetrator. 86 C.J.S. *Torts* § 32. In this case, where the "corporate veil" can be readily pierced to make the individual Respondents, who own all of the stock and assets of the corporate entity liable for the illegal actions of the entity, it is inappropriate to hold those individuals separately liable under a different subdivision of the Human Rights Act for actions for which the corporate entity has already been held liable."

46. At page 71, line 7: change "Respondents" to "Respondents' ".
47. At page 71, line 8: change "Respondents" ' to "Respondents".
48. At page 71, line 11: change "are" to "is".
49. At page 72, line 9: change "Sunday" to "Saturday".

With respect to the Orders Certifying Classes and Directing Notice to Potential Class Members issued on April 27, 1984, please note the following change:

1. At page 4, proposed class (2), line 5: insert "by" between "forbidden" and "the".

I also enclose herewith those portions of the official record in this matter which I retained in order to complete the drafting of my Orders Certifying Classes and Directing Notice to Potential Class Members, including the Original Transcript of the evidentiary hearing.

On May 7, 1984, Attorney Steven Jamar served upon me Notice of the Respondents' Appeal of this matter to the Minnesota Court of Appeals. On May 8, 1984, Special

Assistant Attorney General Elizabeth Cutter informed me by telephone that Chief Judge Peter Popovich of the Court of Appeals had requested, and she had agreed to, a two-week "hold" on the implementation of my Orders Certifying Classes and Directing Notice to Potential Class Members while the Court considered the Respondents' Motion for a Stay. As you are aware, my Orders on Motion to Stay, issued on May 1, 1984, granted a 21-day stay to the Respondents before they would have to implement my Orders to cease and desist and enjoining them from engaging in certain enumerated unfair discriminatory practices in employment (which period could be shortened if so ordered by the Court of Appeals), but granted no relief, in the form of a stay, from my Orders Certifying Classes and Directing Notice to Potential Class Members. It is my understanding that the directive of Chief Judge Popovich will result in postponing the operative deadlines imposed in my Orders Certifying Classes and Directing Notice to Potential Class Members by 14 days. Accordingly, if the Court of Appeals decides not to postpone the implementation of the class action portions of this matter, I will issue new Orders Certifying Classes and Directing Notice to Potential Class Members with the operative deadlines moved back by 14 days.

Very truly yours,

/s/ Richard C. Luis
Administrative Law Judge
Telephone: 612/341-7610

RCL:dld

cc: Clyde F. Anderson, Esq.
Elizabeth V. Cutter, Esq.
Steven D. Jamar, Esq.

## APPENDIX D

## STATE OF MINNESOTA
## OFFICE OF ADMINISTRATIVE HEARINGS
## FOR THE DEPARTMENT OF HUMAN RIGHTS

In the Matter of State of Minnesota, by Marilyn E. McClure, and her successor, Irene Gomez-Bethke, Commissioner, Minnesota Department of Human Rights,

Complainant,

v.

Sports and Health Club, Inc., d/b/a St. Louis Park Sports and Health Club, Apache Sports and Health Club, Midway Sports and Health Club, Normandale Sports and Health Club, LaSalle Sports and Health Club, Northland Park Sports and Health Club and Tonka Sports and Health Club, and Arthur W. Owens, Marc Crevier and Forest Larson,

Respondents.

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## ORDERS CERTIFYING CLASSES AND DIRECTING NOTICE TO POTENTIAL CLASS MEMBERS

### NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2 (1983 Supp.), this Order is the final decision in this case and under Minn. Stat. § 363.072 (1983 Supp.), the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69 (1983 Supp.).

A Motion by the Complainant for an Order Certifying Classes in the above-entitled matter came on for argument

before Hearing Examiner Richard C. Luis at 9:00 a.m. on May 27, 1983, in Courtroom 13 of the Office of Administrative Hearings, Third Floor, Summit Bank Building, 310 Fourth Avenue South, Minneapolis, Minnesota. The Complainant was represented by Elizabeth V. Cutter, 515 Transportation Building, St. Paul, Minnesota 55155 and Mark B. Levinger, 1100 Bremer Tower, Seventh Place and Minnesota Streets, St. Paul, Minnesota 55101. The Respondents were represented by Clyde F. Anderson, Meagher, Geer, Markham, Anderson, Adamson, Flaskamp and Brennan, Attorneys at Law, 2250 IDS Tower, 80 South Eighth Street, Minneapolis, Minnesota 55102.

On July 11, 1983, after having considered all of the filings, arguments, briefs and proceedings herein regarding the Complainant's Motion, the Hearing Examiner issued an Order denying and dismissing without prejudice the Complainant's Motion to Certify Classes. In his July 11, 1983 Order, with attached Memorandum, the Hearing Examiner decided to take under further advisement the Complainant's Motion to Certify Classes at the time of completion of the evidentiary hearing in this matter and upon his determination, if any, of the Respondent's liability under the Minnesota Human Rights Act with respect to the Charging Parties.

The evidentiary hearing in this matter on the question(s) of liability was held in Courtroom 12 of the Office of Administrative Hearings on 14 separate days between July 18 and September 23, 1983. During the hearing, the parties were offered an opportunity by the Hearing Examiner to supplement their arguments made with respect to the Complainant's Motion for an Order Certifying Classes. Both the Complainant and the Respondent decided to rely on

the arguments made prior to the Hearing Examiner's Order of July 11, 1983, regarding the Motion, and on the testimony presented by each at the evidentiary hearing on liability.

The record in the liability portion of this matter closed on April 17, 1984 and, on April 26, 1984, the Hearing Examiner issued Findings of Fact, Conclusions of Law and Orders holding the Respondents liable for various violations of Minn. Stat. § 363.03, subds. 1(2) and 1(4) (a), which are portions of the Minnesota Human Rights Act proscribing unfair discriminatory practices in employment, respecting certain of the Charging Parties.

Based upon all of the proceedings herein, the Hearing Examiner hereby makes the following:

## ORDERS

IT IS HEREBY ORDERED that the Complainants' Motion for an Order Certifying Classes in the above-entitled matter is GRANTED IN PART, and that this action is CERTIFIED, and shall be maintained as a CLASS ACTION with respect to the following persons:

(1) All persons who were discharged from employment by Sports and Health Club, Inc., on or after September 24, 1979 because of religion, marital status and/or sex; and

(2) All persons who were employed by Sports and Health Club, Inc., on or after September 24, 1979, or who are presently employed and who were or continue to be discriminated against with respect to the terms, conditions or upgrading of their employment because of religion, marital status and/or sex; and

(3) All persons who were employed by Sports and Health Club, Inc., on or after September 24, 1979, or who are presently employed and who were or continue to be subjected to acts of reprisal affecting the terms and conditions of their employment, including discharge from employment, for opposing practices by the Respondent which violate the Minnesota Human Rights Act; and

(4) All persons who sought employment by Sports and Health Club, Inc., on or after September 24, 1979, and who were not hired on the basis of religion, marital status and/or sex; and

IT IS FURTHER ORDERED that notification shall be directed to the potential members of the above-enumerated classes at once ,to wit:

(a) A copy of the Notice to Potential Class Members attached hereto be mailed by the Complainant to the current or last known address of each potential class member no later than May 11, 1984; and

(b) That the Complainant immediately post said Notice in each of the Respondents' Clubs in a fashion reasonably designed to come to the attention of all potential class members; and

(c) That the Respondents immediately furnish to the Complainant a list of the names and addresses of all persons employed by them as receptionists and/or associate membership directors on or after September 24, 1979, and cooperate with the Complainant in the posting of the Notice to Potential Class Members attached hereto; and

(c) That the Complainant cause said notice to be published in the Minneapolis Star and Tribune and both the St. Paul Dispatch and the St. Paul Pioneer Press not less than 15 days prior to June 11, 1984; and

IT IS FURTHER ORDERED that June 11, 1984 be and hereby is set as the final date upon which persons who are potential members of the above-enumerated classes shall be allowed to exercise an option to be included in or excluded from any of said classes; and

IT IS FURTHER ORDERED that evidentiary hearing dates be set after June 11, 1984, for the purpose of determining whether persons who have exercised an option to be included in any of the above-enumerated classes qualify as members thereof and/or are entitled to monetary or other relief because they so qualify.

Dated this 27th day of April, 1984.

/s/ Richard C. Luis
Hearing Examiner

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MEMORANDUM

As of March 24, 1980, approximately 11 persons had, since sometime in 1978, filed individual charges of discrimination against the Respondents with the Department of Human Rights. The Charging Parties claimed that they had been discriminated against on the basis of sex, marital status and/or religion. On March 24, 1980, Commissioner McClure issued a formal charge initiating action on behalf of the Charging Parties and others similarly

situated. The scope of the Commissioner's charge was more specifically defined in the Complaint issued in this matter on October 21, 1981, as amended, which alleged that the Respondents had engaged in a pattern and practice of prohibitted discrimination against five different classes of individuals on or after September 24, 1979:

(1) All persons who are presently employed, have been employed, or may be employed by Sports and Health Club, Inc., and who have been, continue to be, or would be subjected to different terms, conditions, upgrading, and/or privileges of employment on the basis of sex, marital status or religion;

(2) All persons who are presently employed, have been employed, or who may be employed by Sports and Health Club, Inc., and who have been, continue to be, or would be subjected to acts of reprisal including, but not limited to termination of employment, for opposing practices forbidden the Minnesota Human Rights Act;

(3) All persons who have sought or may seek employment by Sports and Health Club, Inc., and who have been, or may be rejected on the basis of sex, marital status, or religion;

(4) All persons who have been or may be members of Sports and Health Club, Inc., and who have been, continue to be, or may be denied access to, admission to, full utilization of, or benefit from Sports and Health Club, Inc., on the basis of religion or sex;

(5) All persons who have sought or may seek employment by Sports and Health Club, Inc., and who have been, or may be required to furnish information pertaining to religion, sex, or marital status.

The "cut-off" date of September 24, 1979 was chosen because it is six months before the date the Commissioner issued her charge of discrimination against the Respondents regarding the persons later described as class members in the Complaint. This action was consistent with the Human Rights Act's statute of limitations (Minn. Stat. § 363.06, subd. 3), which provides that a charge of an unfair discriminatory practice must be filed within six months of the occurrence of the practice. The Respondents have been aware of the charge since March 24, 1980, and have never argued that September 24, 1979, is an improper date for commencing eligibility for membership in any class ultimately certified.

On May 6, 1983, the Complainant filed a Motion for Class Certification, requesting the Hearing Examiner to certify the above-noted classes. On July 11, 1983, the Hearing Examiner issued an Order dismissing without prejudice the Complainant's Motion for Class Certification, stating in his Memorandum thereto that he would reserve a final ruling on certification of classes until after the hearing and after his decision on the liability questions regarding the Charging Parties. The question of whether classes should be certified was taken under advisement at that time because the Hearing Examiner determined that the Complainant had not made a factual showing sufficient to justify a certification of any classes of individuals beyond those who had actually filed charges of discrimination with

the Department of Human Rights. The Hearing Examiner has subsequently reviewed and analyzed the record of the evidentiary hearing in the cases of the Charging Parties and now deems it appropriate to certify certain classes.

The Hearing Examiner is now persuaded that the Respondents have, since September 24, 1979, engaged in a pattern and practice of discrimination against its employees and persons who have applied for employment at their Clubs because of religion, marital status and sex. See Findings of Fact, Conclusions of Law and Orders of the Hearing Examiner issued in the liability portion of this matter on April 26, 1984. Minn. Rule 5000.1100, formerly designated as Hum. Rts. 107(e), authorizes suit by the Commissioner on behalf of a class only if:

—there are questions of law or fact common to the class; and
—the claims of members are of sufficient similarity that a fair hearing of them is possible in a class action; and
—the Commissioner will fairly and adequately protect the interests of the class.

If these three elements are satisfied, the suit still cannot commence unless one of three other conditions exist. The Complainant's Motion alleges that the second such condition, listed at Minn. Rule 5000.1100, subpart 1.B., formerly number Hum. Rts. 107(e) (4) (bb), is applicable to this matter. That Rule read, in relevant part:

> "The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate relief that includes final injunctive relief . . . ."

After reviewing the record of the evidentiary hearing, the Hearing Examiner concludes that there are or may be classes of persons in addition to those who were Charging Parties in this matter who were the victims of unfair discriminatory practices in employment, as practiced by the Respondents. He is convinced that these persons, if allowed to present evidence as potential class members, would present facts similar to those presented by the Charging Parties for whom the Hearing Examiner has already found liability. He is similarly convinced that the claims of those potential class members will be sufficiently similar to those of the Charging Parties for whom he has found liability such that a fair hearing of the class members' claims is possible in a class action. And, given the fact that the Complainant has already succeeded in establishing liability against the Respondents on behalf of several Charging Parties, she will fairly and adequately represent the interests of any potential class members. Finally, evidence entered into the record at the hearing amply shows that the Respondents have acted on grounds generally applicable to the classes the Hearing Examiner has certified, and for whom injunctive relief was ordered on April 26, 1984.

Evidence adduced at the hearing on the liability portion of this matter makes it clear that the Respondents, since September 24, 1979, have refused to promote or have discharged persons based on religion, marital status or sex. They have also refused to hire persons for the same impermissible reasons. They have also taken adverse action against employees who opposed actions forbidden by the Minnesota Human Rights Act, such as required Bible study and the requirement that a person be a growing,

"Born-Again" Christian in order to be elevated into management. The Hearing Examiner has so concluded after analyzing the testimony offered by the Charging Parties and several potential class members, who also testified at the hearing. His Findings of Fact, Conclusions of Law and Orders issued on April 26, 1984, lay out in detail instances where many such practices have occurred. Finding #9 in that document enumerates practices of the Respondents involving the Charging Parties and other persons, many of which practices the Respondents simply admitted to, which justify formulation of the classes the Hearing Examiner has certified.

The classes certified herein are narrower than those charged by the Complainant. The major differences are that the Hearing Examiner has not certified a class of persons who applied for work at Sports and Health and were required to furnish information pertaining to religion, marital status or sex, and he has not certified classes of members.

The Hearing Examiner has limited the potential class of prospective employees to those who can establish that they were rejected for employment due to one of the impermissible reasons of religion, marital status or sex because any persons who so qualify are likely to have been required by the Respondents to furnish information pertaining to those topics. The two classes requested by the Complainant for certification regarding potential employees essentially merge with each other. The Hearing Examiner is aware of the fact that he has found that the Complainant proved a charge of illegally requiring one Charging Party, a prospective employee, to furnish information pertaining to religion, but that was the only charge in the Complaint regarding employment discrimination

against that Charging Party. The Hearing Examiner has concluded that it would be unduly burdensome and unfair to the Respondents to include in the class any persons who were required to furnish information pertaining to religion, marital status or sex, who cannot further prove that they were not hired because of one of those reasons. The Respondents sincerely believed that they were within their rights to make such inquiries, and the Hearing Examiner has ruled only yesterday that they were not. He has also enjoined them from such practices in the future. That combination of penalties, and certifying a class of prospective employees who can prove they were not hired because of the impermissible reasons noted, is sufficient action to take at this time, consistent with the spirit of the Commissioner's Complaint, as tempered and modified by the Hearing Examiner who has now heard much of the evidence.

The Hearing Examiner has not certified any classes of Club members. The entire record in this matter to date establishes only one incident of denial to a member by the Respondents of the full and equal enjoyment of a public accommodation. Based on his review of the record, the Hearing Examiner believes the proven charge to be an isolated incident. The record does establish that the Respondents, and many of their current employees, are fervently evangelistic in expressing their religious beliefs, and that they have (and may now) proselytize "Born-Again" Christianity on the premises of their Clubs. But it has not been demonstrated, in this proceeding, that these actions have resulted in a systematic denial of access to, admission to, full utilization of or benefit from their Clubs on the bases of religion or sex.

R.C.L.

(Title of Cause.)

NOTICE TO POTENTIAL CLASS MEMBERS

If you are or have been an employee of or applicant for employment with Sports and Health Club, Inc., on or after September 24, 1979, you may be a class member in a class action lawsuit begun by the Commissioner of Human Rights of the State of Minnesota on your behalf. If you are a class member, this notice contains important information for you.

On March 24, 1980, the Commissioner of the Minnesota Department of Human Rights filed a formal charge against Sports and Health Club, Inc., on behalf of persons who had already filed charges and other persons similarily situated, claiming that these persons had been discriminated against by Sports and Health Club, Inc., on the basis of religion, marital status and/or sex. On October 21, 1981, a Complaint was issued against the Respondents in this matter. On May 6, 1983, the Commissioner filed a Motion for Class Certification with the undersigned, the State Hearing Examiner who had been assigned to hear the cases of the Charging Parties. The Hearing Examiner took the matter under advisement until after the consolidated hearing held on behalf of the Charging Parties. On April 26, 1984, the Hearing Examiner issued a decision consisting of Findings of Fact, Conclusions of Law and Orders regarding the Charging Parties in this matter. Based upon the record developed in the hearing held on behalf of the Charging Parties, the Hearing Examiner has decided to certify certain classes of individuals for potential monetary or other appropriate relief. The class members are defined as follows:

(1) All persons who were discharged from employment by Sports and Health Club, Inc., on or after September 24, 1979 because of religion, marital status and/or sex; and

(2) All persons who were employed by Sports and Health Club, Inc., on or after September 24, 1979, or who are presently employed and who were or continue to be discriminated against with respect to the terms, conditions or upgrading of their employment because of religion, marital status and/or sex; and

(3) All persons who were employed by Sports and Health Club, Inc., on or after September 24, 1979, or who are presently employed and who were or continue to be subjected to acts of reprisal affecting the terms and conditions of their employment, including discharge from employment, for opposing practices by the Respondent which violate the Minnesota Human Rights Act; and

(4) All persons who sought employment by Sports and Health Club, Inc., on or after September 24, 1979, and who were not hired on the basis of religion, marital status and/or sex; and

If your employment or application for employment with Sports and Health Club, Inc., was adversely affected as set forth above, then you are a member of the class or classes certified by the Hearing Examiner.

Minn. Rule 5000.1100, subp. 3 requires that you be informed of the following:

(1) You will be excluded from the class, with respect to monetary relief if you request exclusion in writing and the Hearing Examiner RECEIVES your request on or before June 11, 1984; and

(2) The decision issued on April 26, 1984, will include all those class members who do not request exclusion.

If you are a member of any of the above-listed classes and believe you have lost income or benefits as a result of any action taken by Sports and Health Club, Inc., as set forth above, please contact the attorney for the State of Minnesota, Elizabeth V. Cutter, Special Assistant Attorney General, 515 Transportation Building, St. Paul, Minnesota 55155, telephone (612) 296-6628, before June 8, 1984 concerning your possible participation in this lawsuit.

After he receives notification of your intent to be included in or excluded from potential membership in the above-noted classes, the Hearing Examiner will set a date for a public hearing to determine whether all persons who have elected to be included in a class, or classes, qualify for membership therein. The hearing will also determine which, if any, of the remaining class members are entitled to receive monetary damages or other relief. Each case will be considered on its individual merits. You must also keep the above-mentioned attorney for the State of Minnesota and the Hearing Examiner informed of any changes in your address or telephone number while your claim is pending.

At the hearing, the attorney for the State of Minnesota will represent all potential class members who have elected to be included in any class or classes. You may, if you

wish, retain private counsel to represent you in this lawsuit. Please inform, in writing, the Hearing Examiner or Special Assistant Attorney General Elizabeth V. Cutter of the name and address of the attorney who will represent you in this lawsuit, if you do not wish to be represented by the attorney for the State of Mnnesota.

Dated this 27th day of April, 1984.

/s/ Richard C. Luis
Hearing Examiner
MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
400 Summit Bank BBuilding
310 Fourth Avenue South
Minneapolis, Minnesota 55415

TO: Richard C. Luis
Hearing Examiner
Minnesota Office of Administrative Hearings
400 Summit Bank Building
310 Fourth Avenue South
Minneapolis, Minnesota 55415

I have received the Notice dated April 27, 1984, and hereby request to be:

—excluded from all Class ( )
—included in Class (1) ( )
—included in Class (2) ( )
—included in Class (3) ( )
—included in Class (4) ( )

(PRINT) NAME _____

(SIGN) SIGNATURE _____

ADDRESS _____

_____

_____

_____

## APPENDIX E

(Title of Cause.)

### ORDERS ON MOTION TO STAY

WHEREAS, on April 26, 1984, the Hearing Examiner issued Findings of Fact, Conclusions of Law and Orders in the above-entitled matter; and

WHEREAS, on April 27, 1984, the Hearing Examiner issued Orders Certifying Classes and Directing Notice to Potential Class Members in the above-entitled matter; and

WHEREAS, on April 30, 1984, the Respondents, through their Counsel, made an oral Motion to Stay Implementation of the above-noted Orders issued on April 26 and April 27, 1984, pending a final resolution on appeal of the questions of liability decided by the Hearing Examiner in his Findings of Fact, Conclusions of Law and Order; and

WHEREAS, on April 30, 1984, the Hearing Examiner presided over a telephone conference call between Counsel for the Parties to this matter, wherein the questions of whether the Hearing Examiner has jurisdiction to order a stay in this matter, and, if he has such jurisdiction, what

portion(s), if any, of the Respondents' Motion should be granted were argued. The Complainant was represented by Elizabeth V. Cutter, Special Assistant Attorney General, 515 Transportation Building, John Ireland Boulevard, St. Paul, Minnesota 55155. The Respondents were represented by Steven D. Jamar and Laura Underkuffler, Attorneys for the firm Meagher, Geer, Markham, Anderson, Adamson, Flaskamp and Brennan, 2250 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402; and

WHEREAS, on April 30, 1984, at the conclusion of the above-noted argument and based upon all of the proceedings herein, the Hearing Examiner orally issued ORDERS on the Respondents' Motion to Stay, GRANTING the Motion IN PART as follows:

ORDERS

IT IS HEREBY ORDERED that the Respondents' Motion to Stay Implementation of the Hearing Examiner's Orders issued in the above-entitled matter on April 26 and April 27, 1984, is granted in part, to wit:

(1) That the Respondents' Motion for a stay of imposition of the Hearing Examiner's April 27, 1984 Order Certifying Classes and Directing Notice to Potential Class Members be, and hereby is DENIED; and

(2) That implementation of those portions of the Hearing Examiner's Order of April 26, 1984, is NOT STAYED as to the following: dismissing those portions of the Complaint alleging violations of Minn. Stat. § 363.03, subd. 3, respecting Michael Ormond and Joseph Williams; dismissing those counts of

the Complaint alleging that Respondents Arthur Owens, Marc Crevier and Forest Larson aided and abetted Respondent Sports and Health Club, Inc., in violating Minn. Stat. § 363.03, subds. 1(2), (4) and 3, within the meaning of Minn. Stat. § 363.06, subd. 6; and dismissing without prejudice those portions of the Complaint alleging violation of Minn. Stat. § 363.03, respecting Jeffrey Peters; and

(3) That the implementation of those portions of the Hearing Examiner's Orders of April 26, 1984, granting compensatory damages to Charging Patries Robin Carnahan, Beverly Larsen (Matha), Robert Severin, Marilyn Crosby, Steven Bruhjell, Katherine Lamannsky, Linda Perkins and Joseph Williams, and granting damages for mental anguish or suffering to Charging Parties Robert Severin, Marilyn Crosby and Linda Perkins for unfair discriminatory practices in employment be and hereby are STAYED for 21 days, through May 21, 1984; and

(4) That the scheduling of a hearing to determine the amount of damages payable to the Charging Parties listed at (3) above be and hereby is STAYED for 21 days, through May 21, 1984; and

(5) That the Hearing Examiner's Order that the Respondents pay compensatory damages to Charging Party Miriam Cameron in the amount of $230, plus statutory interest accrued after February 19, 1981, be and hereby is STAYED for 21 days, through May 21, 1984; and

(6) That the implementation of the Hearing Exam-

iner's Orders of April 26, 1984, that the Respondents cease and desist and be enjoined from employment practices listed at subparts (1), (2) and (3) of the final paragraph of his Orders be and hereby is STAYED for 21 days, through May 21, 1984; and

(7) That the implementation of the Hearing Examiner's Order of April 26, 1984, that the Respondents cease and desist and are enjoined from denial to any person of the full and equal enjoyment of its services, facilities and privileges as a public accommodation, to wit: (a) harassment or ridicule of any member, guest, or other user of its services and facilities because of religion, is NOT STAYED; and

(8) That the STAYS GRANTED in this ORDER shall expire before May 21, 1984, if so ordered by the Minnesota Court of Appeals.

Dated this 1st day of May, 1984.

/s/ Richard C. Luis
Hearing Examiner

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MEMORANDUM

The Respondents have announced their intention to appeal the Hearing Examiner's Order of April 26 and 27, 1984, to the Minnesota Court of Appeals. They estimate at least one week will be required to properly prepare for the Court a Writ of Certiorari, Statement of the Case, and other documents required under the Rules of Civil Appellate Procedure. This process may require a determin-

ation by the Hearing Examiner of the amount and form of a supersedeas bond (see Civil Appellate Procedure Rules 115.03, subd. 2 and 108.01).

In the interim, the Respondents argue that they would have to make a decision between complying with the Hearing Examiner's Orders, which they contend interfere with their constitutional right to free exercise of their religion, and closing down their business operations in order to avoid compromising their legal and moral position in this matter. If the Sports and Health Club businesses are closed, approximately 150 people would be unemployed and 18,000 members would be without an exercise facility for which they have already paid. The Hearing Examiner agrees that such consequences would be dire. He also concludes, however, that the discriminatory practices in which he has found that the Respondents engage, and have engaged in for the last several years, must cease, even if such cessation requires a modification in the practice of the Respondents' religion. Since he has so concluded, it would be inappropriate to grant relief to the extent the Respondents have requested it in their Motion, which is stay of imposition of his Orders to cease and desist from unfair discriminatory practices in employment until all avenues of appeal the Respondents may choose to take in this case have been exhausted. Such a process could take several years, during which time the Respondents would continue to act, as their religious beliefs dictate, in conflict with the Minnesota Human Rights Act's mandates and without (the Hearing Examiner concludes, and has so ruled) Constitutional protection. Since he believes that a stay of imposition of any length beyond the relatively short time it should take for the parties to argue the appropriate-

ness of a stay before the Court of Appeals would be inconsistent with the spirit of the Orders he has issued, a three-week period has been granted for the Respondents to get their appeal filed and argue to the Court for a further stay. In setting this deadline, the Hearing Examiner in no way intends to infringe on or supersede the 30-day limit for filing an appeal to the Court or to interfere with the Court of Appeals' schedule or internal operations. The deadline is imposed because he believes that the Respondents do not have constitutional protection for the actions they want to continue in violation of the Minnesota Human Rights Act, and those practices should be stopped.

Counsel for the Complainant argued that the Hearing Examiner does not have jurisdiction to order a stay in this case. Minn. Stat. § 14.65, reads, in relevant part:

> "The filing of the writ of certiorari shall not stay the enforcement of the agency decision; but the agency may do so, or the court of appeals may order a stay upon such terms as it deems proper . . . ."

The Complainant argues that the "agency" referred to in the above-quoted statute is the Department of Human Rights, not the Hearing Examiner from the Minnesota Office of Administrative Hearings. The Hearing Examiner cannot agree. Minn. Stat. § 363.071, subd. 1 states, in part:

> "A complaint issued by the commissioner shall be heard as a contested case, except that the report of the hearing examiner shall be binding on all parties to the proceeding and if appropriate shall be implemented by an order as provided for in subdivision 2".

Subd. 2 of § 363.071 reads, in part:

> "The hearing examiner shall make findings of fact and conclusions of law, and if the hearing examiner finds that the respondent has engaged in an unfair discriminatory practice, the hearing examiner shall issue an order directing the respondent to cease and desist from the unfair discriminatory practice found to exist and take such affirmative action as in the judgment of the examiner will effectuate the purposes of this chapter. Such order shall be a final decision of the department . . .".

Upon consideration of the above-quoted statutes, the Hearing Examiner concluded that the "agency" as contemplated in Minn. Stat. § 14.65 is the person or board which has been granted the power to issue a "final decision". Since the final decision in a Human Rights case presented on behalf of Charging Parties by the Department of Human Rights under Minn. Stat. § 363.071 is made by the Hearing Examiner, it is concluded that he is the "agency" who may grant a stay of his own decision under § 14.65. Such a result is logical because he is the only person or body who has reviewed the record and decided upon the case at this point in the proceedings.

The Hearing Examiner has not granted that portion of the Respondents' Motion which would have staved the implementation of his Order Certifying Classes and Directing Notice to Potential Class Members because he is not persuaded that implementation of the process ordered on April 27, 1984, in anyway interferes with the Respondents' free exercise of religion. The purpose of that Order is to set up a process whereby potential class members can be as-

certained, can receive notice that they may be entitled to relief, and can declare their intention to participate in any future proceedings. No requirement respecting the Respondents' religious-based practices has been imposed by the April 27 Order. The only restraints on such practices were contained in the Orders issued the previous day and those Orders have been stayed. The Hearing Examiner has decided to proceed with the class action portion of the process because he concludes that it is a "matter in the action not affected by the . . . Order(s) from which the appeal is taken" within the meaning of Civil Appellate Procedure Rule 108.03. The formulation of the classes specified in the Order of April 27, 1984, was done after the Hearing Examiner analyzed the record and determined that the Respondents have violated the Minnesota Human Rights Act against certain classes of persons, unspecified as to size, beyond the Charging Parties whose cases were decided in his April 26, 1984 Orders. He concludes that the identity of those classes of persons should be ascertained as soon as possible, and that hearings should proceed to determine if potential class members qualify for relief due to violations, if any, of the Human Rights Act by the Respondents with respect to those individuals. Granting of a stay in his April 27 Order Directing Notification of Class Members would unduly delay this process. And, if any new potential class members have claims that ripen as a result of any continuation of unfair discriminatory practices by the Respondents between May 21, 1984, there will still be at least three weeks in which to notify such persons of their status as a potential class member before the June 11, 1984, deadline imposed for inclusion in the lawsuit.

If the Court of Appeals and/or higher Courts should

issue a stay or stays extending the period during which the Respondents do not have to comply with the Hearing Examiner's Orders of April 26 and April 27, 1984, including a stay on the class action lawsuit cerfitied on April 27, and the Complainant ultimately prevails in this matter, then the time for "populating" the classes with potential class members will have been extended as well for whatever amount of time it takes to exhaust those appellate proceedings (assuming the Respondents continue to undertake practices the Hearing Examiner has already determined to be unlawful). If such a situation comes to pass, a new Order Certifying Classes and Directing Notice to Potential Class Members would be issued to allow any persons whose claims may have ripened in that interim period to receive appropriate notice, identify themselves and elect participation in this action. However, the Hearing Examiner should not and does not assume, at this point, that the reviewing Courts will grant the Respondents' request to stay imposition of his Orders to cease and desist from what he has already determined to be unfair discriminatory practices that should be stopped immediately. Since he recognizes that immediate enforcement of his Orders could cause the Respondents to lay off approximately 150 people and potentially disrupt the routines of 18,000 members of the Respondents' Clubs, or compromise their practices which are based on sincere and undisputed religious beliefs, the Hearing Examiner has granted the Respondents three weeks to request a further stay from the Court of Appeals. If that stay is not granted, then the class action proceeding will not have been disrupted. And, until such a stay is granted, the class action is a matter "not affected by the . . . Order(s) from which the appeal is

taken" because (a) the time period of the stay granted today is sufficiently short so that no persons who potentially qualify for class membership will be unduly prejudiced because of having insufficient time to join the lawsuit, and (b) immediate implementation of the April 27, 1984 Orders Certifying Classes and Directing Notice to Potential Class Members will not interfere with the individual Respondents' free exercise of their religion.

Another situation to be considered regarding action that might be taken by the Court of Appeals on the Respondents' Motion for a Stay is that in which the stay is granted and the Respondents ultimately prevail on appeal. If that happens, the Respondents still would not have had their free exercise of religion rights interfered with because of having to comply with the April 27 Orders Certifying Classes and Directing Notice to Potential Class Members. The final situation, a refusal by the Court of Appeals and/or higher Courts to grant a stay of the Hearing Examiner's April 26 Orders and compliance by the appellate remedies, but staying the class action proceedings pending appellate review, also supports the utility of proceeding with an effort to populate the classes created in the April 27 Orders at this time. This is so because it is easier and more just to ascertain who the potential class members may be, notify them, and require them to opt in or out of the lawsuit now, than it will be several months or even years from now. And, if the Respondents ultimately prevail on appeal, the inconvenience to them now of cooperating with the State in implementing the notification portions of the Class Certification Order will still have been minimal.

The final consideration raised by the Respondents in

opposition to implementing the Notice to Potential Class Members is the adverse publicity that promulgation of the Notice would generate. The Hearing Examiner is not persuaded that this is a consideration which should prevent implementation of his April 27 Class Certification Orders because he has found that the Respondents engage in general practices of unfair discrimination in employment against certain specified classes of individuals. These practices must cease, and potential victims of these practices must be identified, with all deliberate speed. This process should not be delayed for a reason that is supported by no evidence beyond speculation (that promulgation of the Class Action Notice would generate bad publicity and hurt the Respondents' business). Even if that speculation is valid, and the Respondents will be harmed during the interim between now and June 11 by posting and publication of the Notice to Potential Class Members, the Hearing Examiner has concluded that such consequences were generated by unfair discriminatory practices in which the Respondents chose to engage. And he is further persuaded that these practices do not enjoy constitutional protection, as detailed in the Memorandum to his April 26, 1984 Orders. Since any publicity that may result from implementing the Orders issued on April 27, 1984 is a consequences of the actions of the Respondents, it is inappropriate to relieve them of that consequence simply because it may be unpleasant or costly.

R.C.L.

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APPENDIX F

STATE OF MINNESOTA
IN COURT OF APPEALS
C4-84-771

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Sports and Health Club, Inc., et al.,

Relators,

vs.

Department of Human Rights, et al.,

Respondents.

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ORDER

Considered and decided by Popovich, Chief Judge, Forsberg, J., and Leslie, J.

Based upon the file, records, and proceedings, and because:

1. Relators' move for:

a) An order extending the stay issued by the hearing examiner from May 21, 1984 until the matter is resolved by the court of last review.

b) For a stay of the hearing examiner's orders of April 27, 1984, certifying classes and directing notice to potential class members.

2. The respondent moves for dismissal of portions of the appeal.

3. Granting stays pending resolution of an appeal, is analogous to the issuance of a temporary injunction prior

to trial and should follow standards. In *Dahlberg Brothers, Inc., v. Ford Motor Company,* 272 Minn. 264, 137 N.W. 2d 314, 321 (1965) the Minnesota Supreme Court listed five considerations relevant in reviewing a trial court's determination of whether to issue or deny a temporary injunction:

> (1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief.
>
> (2) The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial.
>
> (3) The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief.
>
> (4) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal.
>
> (5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree. (Footnotes omitted.)

This Court believes the five points are relevant to relators requested stay. We do not believe that the relator has met the burden required.

4. Relators imply that the implementation of the hearing examiner's orders will force its clubs to close. The hearing examiner's orders do not order the clubs closure. If

the clubs are closed it is because the owners have chosen to do so. Any claimed hardship or irreparable harm would be caused by the corporation itself.

5. The delay in notifying and identifying class members could result in permanent loss of many potential class members.

6. Relators have not shown a likelihood of success on the merits.

7. The public policy expressed in the Minnesota Human Rights Act, indicates a public policy of eliminating discrimination based upon sex, marital status or religion.

IT IS HEREBY ORDERED:

1. Relators' request for a stay is denied.

2. Relators' request for a stay of the hearing examiner"s orders of April 27, 1984 certifying classes and directing notice to potential class members is denied.

3. Respondents' motion to dismiss is reserved to be decided when the merits are considered.

4. The parties shall brief the issue: whether any portion of relators' appeal is non-appealable, together with other issues.

Dated: May 18, 1984.

BY THE COURT:

/s/ Peter S. Popovich
Chief Judge

JRA:jef

(Title of Cause.)

## APPENDIX G

## ORDER FOR STAY

Based upon the file, records, and proceedings, and because:

1. Relators informed this Court and opposing counsel they intend to petition the Minnesota Supreme Court for accelerated review pursuant to Minn. R. Civ. App. P. 118.

2. During the pendency of such petition the Court of Appeals retains jurisdiction.

IT IS HEREBY ORDERED the orders of the Hearing Examiner dated April 27, 1984 and the stay order of May 1, 1984, expiring May 21, 1984, are stayed until the Minnesota Supreme Court accepts or denies relators' petition for accelerated review.

Dated: May 21, 1984.

BY THE COURT:

/s/ Peter S. Popovich
Chief Judge

JRA:jef

## APPENDIX H

(Title of Cause.)

### ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the Sports and Health Club, et al.'s petition for accelerated review be, and the same is, granted and the matter will be considered on the October En Banc Oral calendar upon the briefs submitted to the Court of Appeals. The Clerk of the Appellate Courts shall transfer the briefs from the Court of Appeals to the Supreme Court.

IT IS FURTHER ORDERED that the motion for a continued stay of the decision of the hearing examiner be, and the same is, denied.

Dated: 8-29-84.

BY THE COURT:
/s/ Douglas K. Amdahl
Chief Justice

APPENDIX I

STATE OF MINNESOTA
IN SUPREME COURT

C4-84-771
CX-84-936

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In the Matter of the State of Minnesota, by Marilyn E. McClure, and her successor, Irene Gomez-Bethke, Commissioner, Department of Human Rights,

Respondent (C4-84-771)
Relator (CX-84-936)

v.

Sports and Health Club, Inc., d.b.a. St. Louis Park Sports and Health Club, et al.,

Relators C4-84-771)
Respondents CX-84-936)

ORDER

This court, having considered en banc the petition for rehearing in the above-entitled matter, and the motion for stay of the effect of the hearing examiner's order of April 27, 1984,

IT IS ORDERED that the petition for rehearing be and hereby is denied.

IT IS FURTHER ORDERED that appellant's motion for a stay of the effect of the hearing examiner's order of April 27, 1984, is granted for a period of 45 days in order to allow appellant to perfect an appeal to the Supreme

Court of the United States. Any application for a stay thereafter should be addressed to the Supreme Court of the United States.

Dated: June 28, 1985.

BY THE COURT:

/s/ Glenn E. Kelley
Associate Justice

Coyne, J. took no part in the consideration or decision of this case.

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APPENDIX J

(Title of Cause.)

JUDGMENT

C4-84-771 & CX-84-936

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the decision of the Office of Administrative Hearings for the Minnesota Department of Human Rights be and the same hereby is affirmed in part; reversed in part; and remanded for further certification proceedings in accordance with the opinion and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT June 28, 1985.

Wayne Tschimperle
Clerk of the Appellate Courts
By: /s/ D. T. Walsh
Assistant Clerk

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APPENDIX K

STATE OF MINNESOTA
IN SUPREME COURT

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C4-84-771
CX-84-936

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In the Matter of the STATE OF MINNESOTA, by MARILYN E. McCLURE, and her successor, IRENE GOMEZ-BETHKE, Commissioner, DEPARTMENT OF HUMAN RIGHTS,

Complainant below
Respondent (C4-84-771)
Relator (CX-84-936)

vs.

SPORTS AND HEALTH CLUB, INC., d/b/a ST. LOUIS PARK SPORTS AND HEALTH CLUB, et al.,

Respondent below
Relators (C4-84-771)
Respondents (CX-84-936).

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Appeal from the Minnesota Supreme Court Judgment and from the decision of the Office of Administrative Hearings for the Minnesota Department of Human Rights

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NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that the parties identified above as respondents below, Sports and Health Club, Inc.,

et al., hereby appeal to the Supreme Court of the United States from the final judgment rendered by the Supreme Court for the State of Minnesota, which judgment was entered in this action on June 28, 1985. This appeal is taken pursuant to 28 U.S.C. §1257(2). Alternatively, the appellants herein respectfully request that the appeal be considered pursuant to 28 U.S.C. §1257(3) and 28 U.S.C. §2103.

Dated: July 26, 1985.

MEAGHER, GEER, MARKHAM, ANDERSON, ADAMSON, FLASKAMP & BRENNAN
By /s/ (illegible)

Clyde F. Anderson (1739)
Gary R. Hoch (45597)
Laura S. Underkueffler (111776)
Steven D. Jamar (49578)
2250 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 338-0661
Attorneys for Respondents Below
Sports and Health Club, Inc.

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA
ss
COUNTY OF HENNEPIN

Nancy L. Watters, being first duly sworn, deposes and says: That on the 26th day of July 1985, she served the

attached Notice of Appeal to the Supreme Court of the United States, upon the Minnesota Department of Human Rights by serving Hubert H. Humphrey, III, Attorney General for the State of Minnesota, and Elizabeth V. Cutter, Special Assistant to the Attorney General, attorneys for the Minnesota Department of Human Rights, by depositing a true and correct copy of the Notice of Appeal in the United States Mail in the City of Minneapolis, Hennepin County, Minnesota, with postage prepaid, in an envelope directed and addressed to Elizabeth V. Cutter at 515 Transportation Building, St. Paul, Minnesota 55155.

/s/ Nancy L. Watters

Subscribed and sworn to before me this 26th day of July, 1985.

/s/ Betty L. Huseby
Notary Public - Minnesota Dakota County
My Commission expires Feb. 16, 1991.

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## APPENDIX L

### CHAPTER 363
### DEPARTMENT OF HUMAN RIGHTS

363.01 DEFINITIONS.

Subdivision 1. Terms. For the purposes of this chapter, the words defined in this section have the meanings ascribed to them.

Subd. 2. [Repealed, 1965 c 586 s 6]

Subd. 3. Board. "Board" means the state board of human rights.

Subd. 4. Employment agency. "Employment agency" means a person or persons who, or an agency which regu-

larly undertakes, with or without compensation, to procure employees or opportunities for employment.

Subd. 5. Labor organization. "Labor organization" means any organization that exists wholly or partly for one or more of the following purposes:

(1) Collective bargaining;

(2) Dealing with employers concerning grievances, terms or conditions of employment; or

(3) Mutual aid or protection of employees.

Subd. 6. National origin. "National origin" means the place of birth of an individual or of any of his lineal ancestors.

Subd. 7. Person. "Person" includes partnership, association, corporation, legal representative, trustee, trustee in bankruptcy receiver, and the state and its departments, agencies, and political subdivisions.

Subd. 8. Respondent. "Respondent" means a person against whom a complaint has been filed or issued.

Subd. 9. Unfair discriminatory practices. "Unfair discriminatory practice" means any act described in section 363.03.

Subd. 10. Discriminate. The term "discriminate" includes segregate or separate and, for purposes of discrimination based on sex, it includes sexual harassment.

Subd. 10a. Sexual harassment. "Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:

(1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment, public accommodations or public services, education, or housing.

(2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment, public accommodations or public services, education, or housing; or

(3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

Subd. 11. [Repealed, 1967 c 897 s 29]

Subd. 12. Real property. "Real property" includes real estate, lands, tenements, and hereditaments, corporeal and incorporeal.

Subd. 13. Real estate broker or salesman. "Real estate broker or salesman" means, respectively, a real estate broker as defined by section 82.17, subdivision 4, and a real estate salesman as defined by section 82.17, subdivision 5.

Subd. 14. Commissioner. "Commissioner" means the commissioner of human rights.

Subd. 15. Employer. "Employer" means a person who has one or more employees.

Subd. 16. Party in interest. "Party in interest" means the complainant, respondent, commissioner or board member.

Subd. 17. Hearing examiners. "Hearing examiners" are persons admitted to practice law who are selected by the commissioner to conduct hearings.

Subd. 18. Public accommodations. "Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facilities of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.

Subd. 19. Public services. "Public service" means any public facility, department, agency, board or commission, owned, operated or managed by or on behalf of the state of Minnesota, or any subdivision thereof, including any county, city, town, township, or independent district in the state.

Subd. 20. Educational institutions. "Educational institution" means a public or private institution and includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery, school system and a business, nursing, professional, secretarial, technical, vocational school; and includes an agent of an educational institution.

Subd. 21. Religious or denominational educational institutions. "Religious or denominational educational institution" means an educational institution which is operated, supervised, controlled or sustained primarily by a religious or denominational organization, or is one which is stated by the parent church body to be and is, in fact, officially related to that church by being represented on the board of the institution, and by providing substantial financial assistance and which has certified, in writing, to the board that it is a religious or denominational educational institution.

Subd. 22. Charging Party. "Charging party" means

a person filing a charge with the commissioner or his designated agent pursuant to section 363.06, subdivision 1.

Subd. 23. Complainant. "Complainant" means the commissioner of human rights after he has issued a complaint pursuant to section 363.06.

Subd. 24. Local commission. "Local commission" means an agency of a city created pursuant to law, city charter, or municipal ordinance for the purpose of dealing with discrimination on the basis of race, color, creed, religion, national origin, sex, age, disability, marital status, status with regard to public assistance, or familial status.

Subd. 25. Disability. "Disability" means any condition or characteristic that renders a person a disabled person. A disabled person is any person who (1) has a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

Subd. 25a. Qualified disabled person. "Qualified disabled person" means:

(1) with respect to employment, a disabled person who, with reasonable accommodation, can perform the essential functions required of all applicants for the job in question; and

(2) with respect to services and programs, a disabled person who, with physical and program access, meets the essential eligibility criteria required of all applicants for the program or service in question.

For the purposes of this subdivision, "disability" excludes any condition resulting from alcohol or drug abuse which prevents a person from performing the essential functions of the job in question or constitutes a direct threat to property or the safety of others.

Subd. 26. Department. "Department" means the department of human rights.

Subd. 27. Status with regard to public assistance. "Status with regard to public assistance" means the condition of being a recipient of federal, state, or local assistance, including medical assistance, or of being a tenant receiving federal, state or local subsidies, including rental assistance or rent supplements.

Subd. 28. Age. "Age" insofar as it refers to any prohibited unfair employment or education practice shall be deemed to protect only those individuals over the age of majority except for section 363.03, subdivision 5 which shall be deemed to protect any individual over the age of 25 years.

Subd. 29. Sex. "Sex" includes, but is not limited to, pregnancy, childbirth, and disabilities related to pregnancy or childbirth.

Subd. 30. Elderly person. "Elderly person" means a person who is at least 55 years of age.

Subd. 31. Familial status. "Familial status" means the condition of one or more minors being domiciled with (a) their parent or parents or the minor's legal guardian or (b) the designee of the parent or parents or guardian with the written permission of the parent or parents or guardian.

Subd. 32. Cooperative apartment corporation. "Cooperative apartment corporation" means a corporation or association organized under sections 308.05 to 308.18 or chapter 317, the shareholders or members of which are entitled, solely by reason of their ownership of stock or membership certificates in the corporation or association, to occupy one or more residential units in a building owned or leased by the corporation or association.

Subd. 33. Physical access. "Physical access" means (1) the absence of physical obstacles that limit a disabled person's opportunity for full and equal use of or benefit from goods, services, and privileges; or, when necessary, (2) the use of methods to overcome the discriminatory effect of physical obstacles. The methods may include redesign of equipment, assignment of aides, or use of alternate accessible locations.

Subd. 34. Program access. "Program access" means (1) the use of auxiliary aids or services to ensure full and equal use of or benefit from goods, services, and privileges; and (2) the absence of criteria or methods of administration that directly, indirectly, or through contractual or other arrangements, have the effect of subjecting qualified disabled persons to discrimination on the basis of disability, or have the effect of defeating or impairing the accomplishment of the objectives of the program.

* * *

363.02 EXEMPTIONS.

Subdivision 1. Employment. The provisions of section 363.03, subdivision 1, shall not apply to:

(1) The employment of any idividual

(a) by his parent, grandparent, spouse, child, or grandchild, or

(b) in the domestic service of any person;

(2) A religious or fraternal corporation, association, or society, with respect to qualifications based on religion, when religion shall be a bona fide occupational qualification for employment.

(3) The employment of one person in place of another, standing by itself, shall not be evidence of an unfair discriminatory practice;

(4) The operation of a bona fide seniority system which mandates differences in such things as wages, hiring priorities, lay-off priorities, vacation credit, and job assignments based on seniority, so long as the operation of the system is not a subterfuge to evade the provisions of chapter 363;

(5) With respect to age discrimination, a practice by which a labor organization or employer offers or supplies varying insurance benefits or other fringe benefits to members or employees of differing ages, so long as the cost to the labor organization or employer for the benefits is reasonably equivalent for all members or employees;

(6) A restriction imposed by state statute, home rule charter, ordinance, or civil service rule, and applied uniformly and without exception to all individuals, which establishes a maximum age for entry into employment as a peace officer or firefighter.

(7) Nothing in this chapter concerning age discrimination shall be construed to validate or permit age requirements which have a disproportionate impact on persons of any class otherwise protected by section 363.03, subdivision 1 or 5.

It is not an unfair employment practice for an employer, employment agency or labor organization:

(i) to require or request a person to undergo physical examination, which may include a medical history, for the purpose of determining the person's capability to perform available employment, provided (a) that an offer of employment has been made on condition that the person meets the physical or mental requirements of the job; (b) that the examination tests only for essential job-related abilities; and (c) that the examination, unless limited to determining

whether the person's disability would prevent performance of the job, is required of all persons conditionally offered employment for the same position regardless of disability; or

(ii) with the consent of the employee, to obtain additional medical information for the purposes of establishing an employee health record;

(iii) to administer pre-employment tests, provided that the tests (a) measure only essential job-related abilities, (b) are required of all applicants for the same position regardless of disability unless limited to determining whether the person's disability would prevent performance of the job, and (c) accurately measure the applicant's aptitude, achievement level, or whatever factors they purport to measure rather than reflecting the applicant's impaired sensory, manual, or speaking skills, except when those skills are the factors that the tests purport to measure; or

(iv) to limit receipt of benefits payable under a fringe benefit plan for disabilities to that period of time which a licensed physician reasonably determines a person is unable to work; or

(v) to provide special safety considerations for pregnant women involved in tasks which are potentially hazardous to the health of the unborn child, as determined by medical criteria.

Subd. 2. Housing. (1) The provisions of section 363.-03, subdivision 2, shall not apply to:

(a) rooms in a temporary or permanent residence home run by a nonprofit organization, if the discrimination is by sex; or

(b) the rental by an owner or occupier of a one-family accommodation in which he resides of a room or rooms in

the accommodation to another person or persons if the discrimination is by sex, marital status, status with regard to public assistance or disability. Nothing in this chapter shall be construed to require any person or group of persons selling, renting or leasing property to modify the property in any way, or exercise a higher degree of care for a person having a disability than for a person who does not have a disability; nor shall this chapter be construed to relieve any person or persons of any obligations generally imposed on all persons regardless of any disability in a written lease, rental agreement, or contract of purchase or sale, or to forbid distinctions based on the inability to fulfill the terms and conditions, including financial obligations of the leaase, agreement or contract.

(2) The provisions of section 363.03, subdivision 2, prohibiting discrimination because of familial status shall not be construed to defeat the applicability of any local, state or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling unit and shall not apply to:

(a) any unoccupied dwelling unit in one building of a housing complex consisting of two buildings or, in a housing complex consisting of three or more buildings, any unoccupied dwelling unit in up to one-third of all buidings in the housing complex. For the purposes of this clause, "housing complex" means a group of buildings each containing five or more units on a contiguous parcel of land owned by the same person; a building shall not be exempt from section 363.03, subdivision 2, pursuant to this clause unless the owner has filed an election to designate the building as exempt with the commissioner; an election made by an owner pursuant to this clause may not be with-

drawn for purposes of designating another building in the housing complex as exempt for a period of one year from the filing of the election; or

(b) any unit in a condominium created prior to April 12, 1980, any unit in a condominium, other than a condominium converted from a residential building, created on or after April 12, 1980, and any unit in an adults-only condominium created from an existing adults-only rental building on or after April 12, 1980, or

(c) an unoccupied dwelling unit in any building in which at least a majority of the dwelling units are occupied by elderly persons or are unoccupied and available for occupancy solely by households of which at least one member is an elderly person; or

(d) any owner occupied building containing four or fewer dwelling units; or

(e) an unoccupied dwelling unit in any building which is the subject of a valid certificate filed with the commissioner pursuant to the provisions of this clause. To be valid, a certificate must be on a form provided by the commissioner, be received by the commissioner, state that on the date that the certificate is received by the commissioner at least a majority of the dwelling units in the building are occupied by elderly persons or are unoccupied and available for occupancy solely by households of which at least one member is an elderly person, state that on the date that the certificate is received by the commissioner there is on file with the owner of the building or a specified duly authorized agent of the owner for each occupied unit relied upon in support of the certificate a signed statement by an elderly person occupying the unit on the date that the certificate is received by the commissioner

that the person is an elderly person, state that for a period of 180 days following the receipt of the certificate by the commissioner the owner or duly authorized agent will preserve the signed statements of the elderly persons and will, upon request, make the statements available for inspection by the commissioner or by any local commission having jurisdiction over the building, be signed by the owner or the duly authorized agent, and be in all respects true and accurate. A valid certificate shall remain valid for a period of 180 days following the date on which it is received by the commissioner. Any owner or authorized agent who files a certificate containing statements or information that the owner or authorized agent knows or should reasonably know to be false shall be guilty of a misdemeanor;

(f) any unoccupied dwelling unit of up to one-third of the units in a building that is not part of a multi-building complex; or

(g) any dwelling unit in a building owned by a cooperative apartment corporation, other than a building converted from a residential building to a cooperative apartment corporation building on or after April 12, 1980, unless that conversion was from an existing adults-only residential rental building.

Subd. 2a. Manufactured home parks. The provisions of subdivision 2, prohibiting discrimination because of familial status:

(1) do not apply to a manufactured home park the majority of whose lots are reserved by park rule to households containing at least one elderly person; and

(2) do not apply to a section or sections of a manufactured home park which are identified by park rule and do not comprise more than one-third of the lots in the park.

This subdivision does not allow a park owner to avoid complying with section 327C.02, subdivision 2, 327C.05 or 327C.07, subdivision 4 when adopting or amending a rule concerning the permitted familial status of residents or of buyers of homes offered for in park sale.

Subd. 3. Education. (a) It is not an unfair discriminatory practice for a religious or denominational institution to limit admission or give preference to applicants of the same religion. The provisions of section 363.03, subdivision 5, relating to sex, shall not apply to a private educational institution, or branch or level of a private educational institution, in which students of only one sex are permitted to enroll. Nothing in this chapter shall be construed to require any educational institution to provide any special service to any person because of the disability of such person or to modify in any manner its buildings, grounds, facilities, or admission procedures because of the disability of any such person. Nothing in this chapter shall prohibit an educational institution from discriminating on the basis of academic qualifications or achievements or requiring from applicants information which relates to academic qualifications or achievements.

(b) Notwithstanding any other provisions of this chapter or any law to the contrary, it is not an unfair discriminatory practice for an educational institution or a public service to operate or sponsor separate athletic teams and activities for members of each sex or to restrict membership on an athletic team to participants of one sex, if this separation or restriction meets the requirements of section 126.21.

(c) The department of human rights shall investigate all charges alleging sex discrimination in athletic programs in educational institutions and public services pursuant to

the standards and requirements of section 126.21 and the procedures enumerated in this chapter.

Subd. 4. Public accommodations. The provisions of section 363.03, subdivision 3, relating to sex, shall not apply to such facilities as restrooms, locker rooms, and other similar places.

Subd. 5. Disability. Nothing in this chapter shall be construed to prohibit any program, service, facility or privilege afforded to a person with a disability which is intended to habilitate, rehabilitate or accommodate that person. It is a defense to a complaint or action brought under this chapter that the person bringing the complaint or action has a disability which in the circumstances and even with reasonable accommodation, as defined in section 363.03, subdivision 1, clause (6), poses a serious threat to the health or safety of the disabled person or others. The burden of proving this defense is upon the respondent.

Subd. 6. Age By law or published retirement policy, a mandatory retirement age may be established without being a violation of this chapter if it is established consistent with section 181.81. Nothing in this chapter nor in section 181.81 shall prohibit employee pension and retirement plans from granting pension credit to employees over the age of 65 at a lesser rate than is granted to other employees, provided that in no event may an employee's accumulated pension credits be reduced by continued employment, and further provided that no other state or federal law is violated by the reduced rate of pension credit accrual. Nothing in this chapter shall be construed to prohibit the establishment of differential privileges, benefits, services or facilities for persons of designated ages if (a) such differential treatment is provided pursuant to statute,

or (b) the designated age is greater than 59 years or less than 21 years.

Subd. 7. Summer youth employment program. The provisions of section 363.03, subdivision 1, with regard to age shall not apply to the state summer youth employment program administered by the commissioner of economic security.

* * *

363.03 UNFAIR DISCRIMINATORY PRACTICES.

Subdivision 1. Employment. Except when based on a bona fide occupational qualification, it is an unfair employment practice:

(1) For a labor organization, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, or age,

(a) to deny full and equal membership rights to a person seeking membership or to a member;

(b) to expel a member from membership;

(c) to discriminate against a person seeking membership or a member with respect to his hire, apprenticeship, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment; or

(d) to fail to classify properly, or refer for employment or otherwise to discriminate against a person or member.

(2) For an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability or age,

(a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or

(b) to discharge an employee; or

(c) to discriminate against a person with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

(3) For an employment agency, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, or age,

(a) to refuse or fail to accept, register, classify properly, or refer for employment or otherwise to discriminate against a person; or

(b) to comply with a request from an employer for referral of applicants for employment if the request indicates directly or indirectly that the employer fails to comply with the provisions of this chapter.

(4) For an employer, employment agency, or labor organization, before a person is employed by an employer or admitted to membership in a labor organization, to

(a) require the person to furnish information that pertains to race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance or disability, unless, for the purpose of national security, information pertaining to national origin is required by the United States, this state or a political subdivision or agency of the United States or this state, or for the purpose of compliance with the public contracts act or any rule, regulation or laws of the United States or of this state requiring information pertaining to race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance or disability is required by the United States or a political subdivision or agency of the United States: or

(b) cause to be printed or published a notice or advertisement that relates to employment or membership and discloses a preference, limitation, specification, or discrim-

ination based on race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability or age.

(5) For an employer, an employment agency or a labor organization, with respect to all employment related purposes, including receipt of benefits under fringe benefit programs, not to treat women affected by pregnancy, childbirth, or disabilities related to pregnancy or childbirth, the same as other persons who are not so affected but who are similar in their ability or inability to work.

(6) For an employer with 50 or more permanent, full-time employees, an employment agency or a labor organization, not to make reasonable accommodation to the known disability of a qualified disabled person unless the employer, agency, or organization can demonstrate that the accommodation would impose an undue hardship on the business, agency, or organization. "Reasonable accommodation" means steps which must be taken to accommodate the known physical or mental limitations of a qualified disabled person. "Reasonable accommodation" may include but is not limited to: (a) making facilities readily accessible to and usable by disabled persons; and (b) job restructuring, modified work schedules that do not reduce the total number of hours normally worked, acquisition or modification of equipment or devices, and the provision of aides on a temporary or periodic basis.

In determining whether an accommodation would impose an undue hardship on the operation of a business or organization, factors to be considered include:

(a) the overall size of the business or organization with respect to number of employees or members and the number and type of facilities;

(b) the type of the operation, including the composition and structure of the work force, and the number of employees at the location where the employment would occur;

(c) the nature and cost of the needed accommodation;

(d) the reasonable ability to finance the accommodation at each side of business; and

(e) documented good faith efforts to explore less restrictive or less expensive alternatives, including consultation with the disabled person or with knowledgeable disabled persons or organizations.

In the case of an accommodation for a job applicant, any cost in excess of $50 imposed on the prospective employer shall be deemed an undue hardship if no alternative costing $50 or less exists. A prospective employer need not pay for an accommodation for a job applicant which costs $50 or less if it is available from an alternative source without cost to the employer or applicant.

Subd. 2. Real property. It is an unfair discriminatory practice:

(1) For an owner, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease any real property, or any agent of any of these:

(a) to refuse to sell, rent, or lease or otherwise deny to or withhold from any person or group of persons any real property because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, or familial status; or

(b) to discriminate against any person or group of persons because of race, color, creed, religion, national origin, sex, marital status, status with regard to public as-

sistance, disability, or familial status in the terms, conditions or privileges of the sale, rental or lease of any real property or in the furnishing of facilities or services of the connection therewith, except that nothing in this clause shall be construed to prohibit the adoption of reasonable rules and regulations intended to protect the safety of minors in their use of the real property or any facilities or services furnished in connection therewith; or

(c) in any transaction involving real property, to print, circulate or post or cause to be printed, circulated, or posted any advertisement or sign, or use any form of application for the purchase, rental or lease of real property, or make any record or inquiry in connection with the prospective purchase, rental, or lease of real property which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, or familial status, or any intent to make any such limitation, specification, or discrimination except that nothing in this clause shall be construed to prohibit the advertisement of a dwelling unit as available to adults-only if the person placing the advertisement reasonably believes that the provisions of this subdivision prohibiting discrimination because of familial status do not apply to the dwelling unit.

(2) For a real estate broker, real estate salesperson, or employee, or agent thereof:

(a) to refuse to sell, rent, or lease or to offer for sale, rental, or lease any real property to any person or group of persons or to negotiate for the sale, rental, or lease of any real property to any person or group of persons because of race, color, creed, religion, national origin, sex, marital

status, status with regard to public assistance, disability, or familial status or represent that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or otherwise deny or withhold any real property or any facilities of real property to or from any person or group of persons because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, or familial status; or

(b) to discriminate against any person because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, or familial status in the terms, conditions or privileges of the sale, rental or lease of real property or in the furnishing of facilities or services in connection therewith; or

(c) to print, circulate, or post or cause to be printed, circulated, or posted any advertisement or sign, or use any form of application for the purchase, rental, or lease of any real property or make any record or inquiry in connection with the prospective purchase, rental or lease of any real property, which expresses directly or indirectly, any limitation, specification or discrimination as to race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, or familial status or any intent to make any such limitation, specification or discrimination except that nothing in this clause shall be construed to prohibit the advertisement of a dwelling unit as available to adults-only if the person placing the advertisement reasonably believes that the provisions of this subdivision prohibiting discrimination because of familial status do not apply to the dwelling unit.

(3) For a person, bank, banking organization, mortgage company, insurance company, or other financial in-

stitution or lender to whom application is made for financial assistance for the purchase, lease, acquisition, construction, rehabilitation, repair or maintenance of any real property or any agent or employee thereof:

(a) to discriminate against any person or group of persons because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, or familial status of the person or group of persons or of the prospective occupants or tenants of the real property in the granting, withholding, extending, modifying or renewing, or in the rates, terms, conditions, or privileges of the financial assistance or in the extension of services in connection therewith; or

(b) to use any form of application for the financial assistance or make any record or inquiry in connection with applications for the financial assistance which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, or familial status or any intent to make any such limitation, specification, or discrimination; or

(c) to discriminate against any person or group of persons who desire to purchase, lease, acquire, construct, rehabilitate, repair or maintain real property in a specific urban or rural area or any part thereof solely because of the social, economic or environmental conditions of the area in the granting, withholding, extending, modifying, or renewing, or in the rates, terms, conditions, or privileges of the financial assistance or in the extension of services in connection therewith.

(4) For any real estate broker or real estate salesperson, for the purpose of inducing a real property transac-

tion from which the person, his firm, or any of its members may benefit financially, to represent that a change has occurred or will or may occur in the composition with respect to race, creed, color, national origin, sex, marital status, status with regard to public assistance, or disability of the owners or occupants in the block, neighborhood, or area in which the real property is located, and to represent, directly or indirectly, that this change will or may result in undesirable consequences in the block, neighborhood, or area in which the real property is located, including but not limited to the lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools or other public facilities.

(5) Notwithstanding the provisions of any law, ordinance, or home rule charter to the contrary, no person shall be deemed to have committed an unfair discriminatory practice based upon age if the unfair discriminatory practice alleged is attempted or accomplished for the purpose of obtaining or maintaining one of the exemptions provided for a dwelling unit provided for in section 363.02, subdivision 2.

Subd. 3. Public accommodations. It is an ufair discriminatory practice:

To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex. It is an unfair discriminatory practice for a taxicab company to discriminate in the access to, full utilization of or benefit from service because of a person's disability. Nothing in this subdivision requires any person to exercise a higher degree of care for a person having a

disability or to modify property in any way except as required by the accessibility provisions of the state building code.

Subd. 4. Public services. It is an unfair discriminatory practice:

(1) To discriminate against any person in the access to, admission to, full utilization of or benefit from any public service because of race, color, creed, religion, national origin, disability, sex or status with regard to public assistance or to fail to ensure physical and program access for disabled persons unless the public service can demonstrate that providing the access would impose an undue hardship on its operation. In determining whether providing physical and program access would impose an undue hardship, factors to be considered include:

(a) the type and purpose of the public service's operation;

(b) the nature and cost of the needed accommodation;

(c) documented good faith efforts to explore less restrictive or less expensive alternatives; and

(d) the extent of consultation with knowledgeable disabled persons and organizations.

Physical and program access must be accomplished within six months of the effective date of this section, except for needed architectural modifications, which must be made within two years of the effective date of this section.

(2) For public transit services to discriminate in the access to, full utilization of, or benefit from service because of a person's disability. Public transit services may use any of a variety of methods to provide transportation for disabled people, provided that persons who are disabled are offered transportation that, in relation to the transportation offered nondisabled persons, is:

(a) in a similar geographic area of operation. To the extent that the transportation provided disabled people is not provided in the same geographic area of operation as that provided nondisabled people, priority must be given to those areas which contain the largest percent of disabled riders. A public transit service may not fail to provide transportation to disabled persons in a geographic area for which it provides service to nondisabled persons if doing so will exclude a sizeable portion of the disabled ridership;

(b) during similar hours of operation;

(c) for comparable fares;

(d) with similar or no restrictions as to trip purpose; and

(e) with reasonable response time.

Public transit services must meet these five criteria for the provision of transit services within three years of the effective date of this section.

Subd. 4a. [Repealed, 1983 c 276 s 11]

Subd. 5. Educational institution. It is an unfair discriminatory practice:

(1) To discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance or disability.

(2) To exclude, expel, or otherwise discriminate against a person seeking admission as a student, or a person enrolled as a student because of race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance or disability.

(3) To make or use a written or oral inquiry, or form of application for admission that elicits or attempts to elicit

information, or to make or keep a record, concerning the race, color, creed, religion, national origin, sex, age, marital status or disability of a person seeking admission, except as permitted by regulations of the department.

Subd. 6. Aiding and abetting and obstruction. It is an unfair discriminatory practice for any person:

(1) Intentionally to aid, abet, incite, compel, or coerce a person to engage in any of the practices forbidden by this chapter;

(2) Intentionally to attempt to aid, abet, incite, compel, or coerce a person to engage in any of the practices forbidden by this chapter;

(3) To intentionally obstruct or prevent any person from complying with the provisions of this chapter, or any order issued thereunder, or to resist, prevent, impede, or interfere with the commissioner or any of his employees or representatives in the performance of duty under this chapter.

Subd. 7. Reprisals. It is an unfair discriminatory practice for any employer, labor organization, employment agency, public accommodation, public service, educational institution, or owner, lessor, lessee, sublessee, assignee or managing agent of any real property, or any real broker, real estate salesperson or employee or agent thereof to intentionally engage in any reprisal against any person because that person:

(1) Opposed a practice forbidden under this chapter or has filed a charge, testified, assisted, or participated in any matter in an investigation, proceeding or hearing under this chapter; or

(2) Associated with a person or group of persons who are disabled or who are of different race, color, creed, religion, or national origin.

A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to do any of the following with respect to an individual because that individual has engaged in the activities listed in clause (1) or (2): refuse to hire the individual; depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status; or inform another employer that the individual has engaged in the activities listed in clause (1) or (2).

Subd. 8. Credit; sex discrimination. It is an unfair discriminatory practice:

(1) to discriminate in the extension of credit to a person because of sex or marital status;

(2) for a credit card issuer to refuse to issue a credit card to a woman under her current or former surname unless there is an intent to defraud or mislead, except that a credit card issuer may require that a woman requesting a card under a former surname open a separate account in that name. A credit card issuer may also require disclosure of any other names under which the credit card applicant may have a credit history.

Subd. 8a. Business; sex discrimination. It is an unfair discriminatory practice for a person engaged in a trade or business or in the provision of a service to refuse to do business with or provide a service to a woman based on her use of her current or former surname. It is an unfair discriminatory practice for a person to impose, as a condition of doing business with or providing a service to a woman, that a woman use her current surname rather than a former surname.

Subd. 9. Interference with pension rights. For purposes of subdivision 1 discrimination on account of age shall include acts which interfere with an employee's opportunity to acquire pension credits or pension benefits when the interference cannot be shown to have been based on just cause unrelated to the employee's status with regard to his pension credits or pension benefits.

Subd. 10. Discrimination against blind or deaf persons prohibited. (a) It is an unfair discriminatory practice for an owner, operator or manager of a hotel, restaurant, public conveyance or other public place, to prohibit a blind or deaf person from taking a guide dog into the public place or conveyance if the guide dog can be properly identified as being from a recognized school for seeing eye, hearing ear or guide dogs, and if the dog is properly harnessed or leashed so that the blind or deaf person may maintain control of the dog.

(b) No person shall require a blind or deaf person to make an extra payment or pay an additional charge when taking a guide dog into any of the public places referred to in paragraph (a).

* * *

363.031 WAIVER PROHIBITED.

Any provision, whether oral or written, of a lease, contract, or other agreement or instrument, which purports to be a waiver by an individual of any right or remedy provided in chapter 363 is contrary to public policy and void. Nothing in this section shall be construed to prevent a waiver given in full and final written settlement of an existing, identified claim, whether by grievance, mediation, arbitration, or other settlement agreement.

* * *

## 363.04 DEPARTMENT OF HUMAN RIGHTS.

Subdivision 1. Creation; commissioner. There is established a department of human rights under the direction and supervision of a commissioner who shall be appointed by the governor under the provisions of section 15.06.

Subd. 2. Deputy commissioner, duties. There shall be in the department a deputy commissioner, who shall be appointed by the commissioner and shall serve at the pleasure of the commissioner. The deputy commissioner shall act for, and exercise the powers of the commissioner during the absence or disability of the commissioner or in the event of a vacancy in the office of commissioner. The deputy commissioner shall perform such functions, powers and duties as the commissioner shall prescribe from time to time.

Subd. 3. [Repealed, 1981 c 330 s 8]

Subd. 4. Task force, membership, appeals. The commissioner may appoint a human rights advisory task force.

Subd. 4a. Terms; compensation; removal; vacancies. The expiration, membership terms, compensation, removal of members, and filling of vacancies on the task force shall be as provided in section 15.059.

Subd. 5. [Repealed, 1983 c 260 s 68]

Sudb. 6. [Repealed, 1976 c 134 s 79]

Subd. 7. [Repealed, 1976 c 337 s 3]

Subd. 8. [Repealed, 1976 c 337 s 3]

Subd. 9. Departmental organization. Subject to other provisions of this chapter, the commissioner shall have the powers granted by section 15.06 to organize the department.

Subd. 10. Continuity in operations. In exercising the functions, powers and duties conferred on and transferred to the commissioner by Laws 1967, Chapter 897, the commissioner shall give full consideration to the need for operational continuity of the functions transferred.

* * *

363.05 DUTIES OF COMMISSIONER.

Subdivision 1. Formulation of policies. The commissioner shall formulate policies to effectuate the purposes of this chapter and shall:

(1) Exercise leadership under the direction of the governor in the development of human rights policies and programs, and make recommendations to the governor and the legislature for their consideration and implementation;

(2) cooperate and consult with appropriate commissioners and agencies, in developing plans and programs to most effectively serve the needs of Indians, to assist women and to fulfill the purposes of chapter 363;

(3) establish and maintain a principal office in St. Paul, and any other necessary branch offices at any location within the state;

(4) meet and function at any place within the state;

(5 employ such hearing examiners, attorneys, clerks and other employees and agents as he may deem necessary and prescribe their duties;

(6) to the extent permitted by federal law and regulation, utilize the records of the department of economic security of the state when necessary to effectuate the purposes of this chapter;

(7) obtain upon request and utilize the services of all state governmental departments and agencies;

(8) adopt suitable rules and regulations for effectuating the purposes of this chapter;

(9) issue complaints, receive and investigate charges alleging unfair discriminatory practices, and determine whether or not probable cause exists for hearing;

(10) subpoena witnesses, administer oaths, take testimony, and require the production for examination of any books or papers relative to any matter under investigation or in question; authorize hearing examiners to exercise the authority conferred by this clause;

(11) attempt, by means of education, conference, conciliation, and persuasion to eliminate unfair discriminatory practices as being contrary to the public policy of the state;

(12) conduct research and st.dy discriminatory practices;

(13) publish and distribute the results of research and study when in the judgment of the commissioner the purposes of this chapter, will be served thereby;

(14) develop and conduct programs of formal and informal education designed to eliminate discrimination and intergroup conflict by use of educational techniques and programs he deems necessary;

(15) make a written report of the activities of the commissioner to the governor each year and to the legislature by November 15 of each even-numbered year;

(16) accept gifts, bequests, grants or other payments public and private to help finance the activities of the department;

(17) create such local and statewide advisory committees as will in his judgment aid in effectuating the purposes of the department of human rights;

(18) appoint a hearing examiner to preside at a public hearing on any complaint;

(19) develop such programs as will aid in determining the compliance throughout the state with the provisions of this chapter, and in the furtherance of such duties, conduct research and study discriminatory practices based upon race, color, creed, religion, national origin, sex, age, disability, marital status, status with regard to public assistance, familial status, or other factors and develop accurate data on the nature and extent of discrimination and other matters as they may affect housing, employment, public accommodations, schools, and other areas of public life;

(20) develop and disseminate technical assistance to persons subject to the provisions of this chapter, and to agencies and officers of governmental and private agencies;

(21) provide staff services to such advisory committees as may be created in aid of the functions of the department of human rights;

(22 make grants in aid to the extent that appropriations are made available for that purpose in aid of carrying out his duties and responsibilities, but no grant in aid shall be made without first obtaining the advice and consent of the board;

(23) develop educational programs, community organization programs, leadership development programs, motivational programs, and business development programs for the benefit of those persons therefore and hereafter subject to prejudice and discrimination;

(24) provide information for and direction to a program designed to assist Indian citizens to assume all the rights, privileges, and duties of citizenship; and to coordinate and

cooperate with local, state and national and private agencies providing services to the Indian people; and

(25) cooperate and consult with the commissioner of labor and industry regarding the investigation of violations of, and resolution of complaints regarding section 363.03, subdivision 9.

Subd. 2. Enforcement of subpoena. Disobedience of a subpoena issued by the commissioner pursuant to subdivision 1 shall be punishable in like manner as a contempt of the district court in proceedings instituted upon application of the commissioner made to the district court of the county where the alleged unfair discriminatory practice in connection with a charge made by a charging party or a complaint filed by the commissioner has occurred or where the respondent resides or has his principal place of business.

* * *

363.06 GRIEVANCES.

Subdivision 1. Charge filing. Any person aggrieved by a violation of this chapter may bring a civil action as provided in section 363.14, subdivision 1, clause (a), or may file a verified charge with the commissioner or his designated agent, stating the name and address of the person alleged to have committed an unfair discriminatory practice, setting out the details of the practice complained of and, if applicable, providing witnesses, documents, and any other information required by the commissioner. The commissioner may dismiss a charge when the charging party fails to provide required information. The commissioner within five days of the filing shall serve a copy of the charge and a request for a response upon the re-

spondent personally or by registered or certified mail. After the filing of a charge the commissioner shall notify the charging party in writing of any change in the status of the charge. A copy of the notice shall be mailed to the respondent.

Subd. 2. Charge, issuance by commissioner. Whenever the commissioner has reasons to believe that a person is engaging in an unfair discriminatory practice, the commissioner may issue a charge stating in statutory language an alleged violation of a particular section of section 363.03.

Subd. 3. Time for filing claim. A claim of an unfair discriminatory practice must be brought as a civil action pursuant to section 363.14, subdivision 1, clause (a), filed in a charge with a local commission pursuant to section 363.116, or filed in a charge with the commissioner within 300 days after the occurrence of the practice. The running of the 300 day limitation period is suspended during the time a potential charging party and respondent are voluntarily engaged in a dispute resolution process involving a claim of unlawful discrimination under chapter 363, including arbitration, conciliation, mediation or grievance procedures pursuant to a collective bargaining agreement or statutory, charter, or ordinance provisions for a civil service or other employment system. A potential respondent who participates in such a process with a potential charging party before a charge is filed or a civil action is brought shall notify the department and the charging party in writing of his or her participation in the process and the date the process commenced, and shall also notify the department and the charging party of the ending date of the process. A respondent who fails to provide this notifi-

cation is barred from raising the defense that the statute of limitations has run unless the 300 days plus a period of time equal to the suspension period has passed.

Subd. 4. Inquiry into charge. (1) Consistent with clause (7), the commissioner shall promptly inquire into the truth of the allegations of the charge. The commissioner shall make an immediate inquiry when a charge alleges actual or threatened physical violence. The commissioner shall also make an immediate inquiry when it appears that a charge is frivolous or without merit and shall dismiss those charges.

The commissioner shall then give priority to investigating and processing those charges which the commissioner determines have one or more of the following characteristics:

(a) there is evidence that the respondent has intentionally engaged in a reprisal;

(b) there is evidence of irreparable harm if immediate action is not taken;

(c) there is potential for broadly promoting the policies of this chapter;

(d) a significant number of recent charges have been filed against the respondent;

(e) the respondent is a government entity;

(f) the charge is supported by substantial documentation, witnesses, or other evidence.

The commissioner shall inform charging parties of these priorities and shall tell each party if their charge is a priority case or not.

On other charges the commissioner shall make a determination within 12 months after the charge was filed as to whether or not there is probable cause to credit the allegation of unfair discriminatory practices, and

(2) If the commissioner determines after investigation that no probable cause exists to credit the allegations of the unfair discriminatory practice, the commissioner shall, within ten days of the determination, serve upon the charging party and respondent written notice of the determination. Within ten days after receipt of notice, the charging party may request in writing on forms prepared by the department that the commissioner reconsider his determination. The request shall contain a brief statement of the reasons for and new evidence in support of the request for reconsideration. At the time of submission of the request to the commissioner, the charging party shall deliver or mail to the respondent a copy of the request for reconsideration. The commissioner shall either reaffirm or reverse his determination of no probable cause within 20 days after receipt of the request for reconsideration, and he shall within ten days notify in writing the charging party and respondent of his decision to reaffirm or reverse.

A decision by the commissioner that no probable cause exists to credit the allegations of an unfair discriminatory practice shall not be appealed to the court of appeals pursuant to section 363.072 or sections 14.63 to 14.68.

(3) If the commissioner determines after investigation that probable cause exists to credit the allegations of unfair discriminatory practices, the commissioner shall serve on the respondent and his attorney if he is represented by counsel, by first class mail, a notice setting forth a short plain written statement of the alleged facts which support the finding of probable cause and an enumeration of the provisions of law allegedly violated. If the commissioner determines that attempts to eliminate the alleged unfair practices through conciliation pursuant to subdivision 5

have been or would be unsuccessful or unproductive, the commissioner shall issue a complaint and serve on the respondent, by registered or certified mail, a written notice of hearing together with a copy of the complaint, requiring the respondent to answer the allegations of the complaint at a hearing before a hearing examiner at a time and place specified in the notice, not less than ten days after service of said complaint. A copy of the notice shall be furnished to the charging party and the attorney general.

(4) If, at any time after the filing of a charge, the commissioner has reason to believe that a respondent has engaged in any unfair discriminatory practice, the commissioner may file a petition in the district court in a county in which the subject of the complaint occurs, or in a county in which a respondent resides or transacts business, seeking appropriate temporary relief against the respondent, pending final determination of proceedings under this chapter, including an order or decree restraining him from doing or procuring an act tending to render ineffectual an order the commissioner may enter with respect to the complaint. The court shall have power to grant temporary relief or a restraining order as it deems just and proper, but no relief or order extending beyond ten days shall be granted except by consent of the respondent or after hearing upon notice to the respondent and a finding by the court that there is reasonable cause to believe that the respondent has engaged in a discriminatory practice. Except as modified by this section, the Minnesota rules of civil procedure shall apply to an application, and the district court shall have authority to grant or deny the relief sought on conditions as it deems just and equitable. All hearings under this section shall be given precedence as nearly as practicable over all other pending civil actions.

(5) If a lessor, after he has engaged in a discriminatory practice defined in section 363.03, subdivision 2, clause (1), (a), leases or rents a dwelling unit to a person who has no knowledge of the practice or of the existence of a charge with respect to the practice, the lessor shall be liable for actual damages sustained by a person by reason of a final order as provided in this section requiring the person to be evicted from the dwelling unit.

(6) In any complaint issued under this section, the commissioner may seek relief for a class of individuals affected by an unfair discriminatory practice occurring on or after a date 300 days prior to the filing of the charge from which the complaint originates.

(7) The commissioner may adopt policies to determine which charges are processed and the order in which charges are processed based on their particular social or legal significance, administrative convenience, difficulty of resolution, or other standard consistent with the provisions of this chapter.

(8) The hearing examiner shall adopt policies to provide sanctions for intentional and frivolous delay caused by any charging party or respondent in an investigation, hearing, or any other aspect of proceedings before the department under this chapter.

Subd. 4a. Emergency rules. The commissioner may adopt emergency rules pursuant to chapter 14 to carry out the purposes of this section. Emergency and permanent rules adopted pursuant to this subdivision apply to cases pending before the commissioner on the date of adoption.

Subd. 5. Attempts to eliminate unfair practices. The commissioner, in complying with subdivision 4, shall endeavor to eliminate the unfair discriminatory practice

through education, conference, conciliation and persuasion at the place where the practice occurred, or the respondent resides or has his principal place of business.

Subd. 6. Publication of accounts of cases. The commissioner may publish an account of a case in which the complaint has been dismissed or the terms of settlement of a case that has been voluntarily adjusted. Except as provided in other sections of this chapter, the commissioner shall not disclose any information concerning his efforts in a particular case to eliminate an unfair discriminatory practice through education, conference, conciliation and persuasion.

Subd. 7. [Repealed 1976 c 301 s 5]

Subd. 8. Access to documents. The charging party or his representative may review the answer of the respondent to the charge submitted pursuant to subdivision 1. The department shall make these documents available to the charging party.

363.07 [Repealed, 1967 c 897 s 29]

* * *

363.071 HEARINGS.

Subdivision 1. Conduct of hearings. A complaint issued by the commissioner shall be heard as a contested case, except that the report of the hearing examiner shall be binding on all parties to the proceeding and if appropriate shall be implemented by an order as provided for in subdivision 2. The hearing shall be conducted at a place designated by the commissioner, within the county where the unfair discriminatory practice occurred or where the respondent resides or has his principal place of business. The hearing shall be conducted in accordance with

Minnesota Statutes 1965, Sections 15.0418, 15.0419, 15.0421, 15.0422, and is subject to appeal in accordance with section 15.0424.

Subd. 1a. Hearings 180 days after charge. At any time after 180 days from the filing of a charge, if there has been neither a finding of probable cause nor of no probable cause, the charging party may file a request with the commissioner to appear at a hearing on his own behalf or through a private attorney. Upon receipt of the request, the commissioner shall review the documents and information held in the department's files concerning the charge and shall release to the charging party and respondent all documents and information that is accessible to the charging party and respondent under sections 13.01 to 13.87. The commissioner shall forward the request for hearing to the office of administrative hearings, which shall promptly set the matter for hearing. If the charging party prevails at this hearing, the hearing examiner may require the respondent to reimburse the charging party for reasonable attorney's fees.

Subd. 2. Determination of discriminatory practice. The hearing examiner shall make findings of fact and conclusions of law, and if the hearing examiner finds that the respondent has engaged in an unfair discriminatory practice, the hearing examiner shall issue an order directing the respondent to cease and desist from the unfair discriminatory practice found to exist and to take such affirmative action as in the judgment of the examiner will effectuate the purposes of this chapter. Such order shall be a final decision of the department. The examiner shall order any respondent found to be in violation of any provision of section 363.03 to pay a civil penalty to the state.

This penalty is in addition to compensatory and punitive damages to be paid to an aggrieved party. The hearing examiner shall determine the amount of the civil penalty to be paid, taking into account the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the respondent. Any penalties imposed under this provision shall be paid into the general fund of the state. In all cases where the examiner finds that the respondent has engaged in an unfair discriminatory practice the examiner shall order the respondent to pay an aggrieved party, who has suffered discrimination, compensatory damages in an amount up to three times the actual damages sustained. In all cases, the examiner may also order the respondent to pay an aggrieved party, who has suffered discrimination, damages for mental anguish or suffering and reasonable attorney's fees, in addition to punitive damages in an amount not more than $6,000. Punitive damages shall be awarded pursuant to section 549.20. In any case where a political subdivision is a respondent the total of punitive damages awarded an aggrieved party may not exceed $6,000 and in that case if there are two or more respondents the punitive damages may be apportioned among them. Punitive damages may only be assessed against a political subdivision in its capacity as a corporate entity and no regular or ex officio member of a governing body of a political subdivision shall be personally liable for payment of punitive damages pursuant to this subdivision. In addition to the aforesaid remedies, in a case involving discrimination in

(a) employment, the examiner may order the hiring, reinstatement or upgrading of an aggrieved party, who

has suffered discrimination, with or without back pay, admission or restoration to membership in a labor organization, or his admission to or participation in an apprenticeship training program, on-the-job training program, or other retraining program, or any other relief the examiner deems just and equitable.

(b) housing, the examiner may order the sale, lease, or rental of the housing accommodation or other real property to an aggrieved party, who has suffered discrimination, or the sale, lease or rental of a like accommodation or other real property owned by or under the control of the person against whom the complaint was filed, according to terms as listed with a real estate broker, or if no such listing has been made, as otherwise advertised or offered by the vendor or lessor, or any other relief the examiner deems just and equitable.

The examiner shall cause the findings of fact, conclusions of law, and order to be served on the respondent personally, the charging party by registered or certified mail, and shall furnish copies to the attorney general and the commissioner.

Subd. 3. Dismissal of hearing. If the examiner makes findings of fact, conclusions of law, and an order in favor of the respondent, such order shall be a final decision of the department.

Subd. 4. Respondents subject to state licensing or regulatory power. In the case of a respondent which is subject to the licensing or regulatory power of the state or any political subdivision or agency thereof, if the hearing examiner determines that the respondent has engaged in a discriminatory practice, and if the respondent does not cease to engage in such discriminatory practice, the commissioner may so certify to the licensing or regulatory agency.

Unless such determination of discriminatory practice is reversed in the course of judicial review, a final determination is binding on the licensing or regulatory agency. Such agency may take appropriate administrative action, including suspension or revocation of the respondent's license or certificate of public convenience and necessity, if such agency is otherwise authorized to take such action.

Subd. 5. Public contracts. In the case of a respondent which is a party to a public contract, if the hearing examiner determines that the respondent has engaged in a discriminatory practice, the commissioner may so certify to the contract letting agency. Unless such finding of a discriminatory practice is reversed in the course of judicial review, a final determination is binding on the contract letting agency and such agency may take appropriate administrative action, including the imposition of financial penalties or termination of the contract, in whole or in part, if such agency is otherwise authorized to take such action.

Subd. 6. Subpoenas. After the issuance of a complaint pursuant to section 363.06, subdivision 4, a charging party or a respondent may request that the hearing examiner issue subpoenas requiring the presence of witnesses or the production for examination of books or papers not privileged and relevant to any matter in question at the hearing.

* * *

363.072 DISTRICT COURT, REVIEW ORDERS OF PANEL OR EXAMINER.

Subdivision 1. Appeal. The commissioner or a person aggrieved by a final decision of the department reached

after a hearing held pursuant to section 363.071 may seek judicial review in accordance with chapter 14. The attorney general shall represent on appeal, a charging party who prevailed at a hearing authorized by section 363.071, subdivision 1a, if the charging party requests representation within ten days after receipt of the petition for appeal.

Subd. 2. Review procedure. The judicial review proceedings shall be in accordance with chapter 14.

* * *

363.073 CERTIFICATES OF COMPLIANCE FOR PUBLIC CONTRACTS.

Subdivision 1. Scope of application. No department or agency of the state shall accept any bid or proposal for a contract or execute any contract for goods or services in excess of $50,000 with any business having more than 20 full-time employees in Minnesota at any time during the previous 12 months, unless the firm or business has an affirmative action plan for the employment of minority persons, women, and the disabled that has been approved by the commissioner of human rights. Receipt of a certificate of compliance issued by the commissioner shall signify that a firm or business has an affirmative action plan that has been approved by the commissioner. A certificate shall be valid for a period of two years.

Subd. 2. Revocation of certificate. Certificates of compliance may be suspended or revoked by the commissioner if a holder of a certificate has not made a good faith effort to implement an affirmative action plan that has been approved by the commissioner. If a contractor does not effectively implement an affirmative action plan ap-

proved by the commissioner pursuant to subdivision 1, or fails to make a good faith effort to do so, the commissioner may refuse to approve subsequent plans submitted by that firm or business.

Subd. 3. Revocation of contract. A contract awarded by a department or agency of the state may be terminated or abridged by the department or agency because of suspension or revocation of a certificate based upon a contractor's failure to implement or make a good faith effort to implement an affirmative action plan approved by the commissioner under this section.

Subd. 4. Technical assistance. In the case of a contractor whose certificate of compliance has been suspended, the commissioner shall provide technical assistance that may enable the contractor to be recertified within 90 days after the contractor's certificate has been suspended.

* * *

363.074 RULES FOR CERTIFICATES OF COMPLIANCE.

The commissioner shall adopt rules to implement section 363.073 specifying the criteria used to review affirmative action plans and the standards used to review implementation of affirmative action plans. A firm or business certified to be in compliance with affirmative action requirements of a local human rights agency or the federal government shall be deemed to be in compliance with section 363.073 upon submission to the commissioner of an affirmative action plan approved by a local human rights agency or the federal government and amendments to the plan which are necessary to address the employment of disabled persons protected by section 363.03, subdivision 1.

* * *

363.075 EMERGENCY RULES.

The commissioner shall have authority to promulgate emergency rules pursuant to chapter 14 to carry out the purposes of section 363.073.

363.08 [Repealed, 1967 c 897 s 29]

363.09 [Repealed, 1967 c 897 s 29]

* * *

363.091 ENFORCEMENT.

When a respondent fails or refuses to comply with a final decision of the department, the commissioner may file with the clerk of district court in the judicial district in which the hearing was held a petition requesting the court to order the respondent to comply with the order of the department. Thereupon the court shall issue an order to show cause directed to the respondent why an order directing compliance should not be issued. Notwithstanding the provisions of any law or rule of civil procedure to the contrary, the court shall examine at the hearing on the order to show cause all the evidence in the record and may amend the order of the department in any way the court deems just and equitable. If the panel or examiner has ordered an award of damages pursuant to section 363.071 and if the court sustains or modifies the award, it shall enter judgment on the order or modified order in the same manner as in the case of an order of the district court, as provided in section 546.27.

363.10 [Repealed, 1982 c 501 s 26; 1983 c 247 s 219]

* * *

## 363.101 UNFAIR DISCRIMINATORY PRACTICE A MISDEMEANOR.

In addition to all other remedies provided under this chapter, every person who commits an unfair discriminatory act as set forth in section 363.03, subdivision 3, or aids, abets, incites, compels, or coerces another to do so, shall be guilty of a misdemeanor.

* * *

## 363.11 CONSTRUCTION.

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of the civil rights law or of any other law of this state relating to discrimination because of race, creed, color, religion, sex, age, disability, marital status, status with regard to public assistance or national origin or familial status; but, as to acts declared unfair by sections 363.03 and 363.123, the procedure herein provided shall, while pending, be exclusive.

* * *

## 363.115 REFERRAL TO LOCAL COMMISSION.

The commissioner, whether or not a charge has been filed under this chapter, may refer a matter involving discrimination because of race, color, religion, sex, creed, disability, marital status, status with regard to public assistance, national origin, age, or familial status to a local commission for study and report.

Upon referral by the commissioner, the local commission shall make a report and make recommendations to

the commissioner and take other appropriate action within the scope of its powers.

* * *

363.116 TRANSFER TO COMMISSIONER.

A local commission may refer a matter under its jurisdiction to the commissioner.

The charging party has the option of filing a charge either with a local commission or the department. Notwithstanding the provisions of any ordinance to the contrary, a charge may be filed with a local commission within 300 days after the occurrence of the practice. The exercise of such choice in filing a charge with one agency shall preclude the option of filing the same charge with the other agency. At the time a charge comes to the attention of a local agency, the agency or its representative shall inform the charging party of this option, and of his rights under Laws 1967, Chapter 897.

The term "local commission" as used in this section has the same meaning given the term in section 363.115.

* * *

363.117 WITHDRAWAL FROM A LOCAL COMMISSION.

Notwithstanding the provisions of any law or ordinance to the contrary, a person who has filed a charge with a local commission may bring a civil action as provided in section 363.14 at the following times:

(a) Within 45 days after the local commission has determined that there is no probable cause to credit the allegations contained in the charge: or

(b) After 45 days from the filing of the charge if a

hearing has not been held or if the local commission has not entered into a conciliation agreement to which the charging party is a signator. The charging party shall notify the local commission of his intention to bring a civil action, which shall be commenced within 90 days of giving the notice.

A charging party bringing a civil action shall mail by registered or certified mail a copy of the summons and complaint to the local commission and upon their receipt the local commission shall terminate all proceedings before the local commission relating to the charge. No charge shall be filed or reinstituted with the local commission after a civil action relating to the same unfair discriminatory practice has been brought unless the civil action has been dismissed without prejudice.

* * *

363.12 DECLARATION OF POLICY.

Subdivision 1. It is the public policy of this state to secure for persons in this state, freedom from discrimination;

(1) In employment because of race, color, creed, religion, national origin, sex, marital status, disability, status in regard to public assistance and age;

(2) In housing and real property because of race, color, creed, religion, national origin, sex, marital status, disability, status with regard to public assistance and familial status;

(3) In public accommodations because of race, color, creed, religion, national origin, sex and disability;

(4) In public services because of race, color, creed, religion, national origin, sex, marital status, disability and status in regard to public assistance; and

(5) In education because of race, color, creed, religion, national origin, sex, marital status, disability, status with regard to public assistance and age. Such discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy. It is also the public policy of this state to protect all persons from wholly unfounded charges of discrimination. Nothing in this chapter shall be interpreted as restricting the implementation of positive action programs to combat discrimination.

Subd. 2. The opportunity to obtain employment, housing, and other real estate, and full and equal utilization of public accommodations, public services, and educational institutions without such discrimination as is prohibited by this chapter is hereby recognized as and declared to be a civil right.

Subd. 3. The department of human rights under the control of the commissioner of human rights is the successor of the state commission against discrimination as it existed immediately prior to July 1, 1967.

Subd. 4. If any provision of Laws 1967, Chapter 879 or the application thereof to any person or circumstances is held invalid, the invalidity does not affect the other provisions or applications of Laws 1967, Chapter 897 which can be given effect without the invalid provision or application, and to this end the provisions of Laws 1967, Chapter 897 are severable.

* * *

363.121 DEPARTMENT ATTORNEY.

The attorney general shall be the attorney for the department.

* * *

363.122 [Repealed, 1978 c 793 s 98]

363.123 VIOLATION OF ACT.

It shall be a violation of Laws 1973, Chapter 729 for any person furnishing credit service to discriminate against any person who is the recipient of federal, state or local public assistance, including medical assistance, or who is a tenant receiving federal, state or local housing subsidies, including rental assistance or rent supplements, solely because the individual is such a recipient.

* * *

363.13 CITATION.

This chapter shall be known as the Minnesota human rights act.

* * *

363.14 COURT ACTIONS, SUITS BY PRIVATE PARTIES, INTERVENTION, DISTRICT COURT JURISDICTION, ATTORNEY'S FEES, AND COSTS.

Subdivision 1. Court actions, suits by private parties, intervention. A person may bring a civil action seeking redress for an unfair discriminatory practice:

(a) Directly to district court; or

(b) Notwithstanding the provisions of any law to the contrary, (1) within 45 days after the commissioner has dismissed a charge because it is frivolous or without merit, because the charging party has failed to provide required information, because the commissioner has determined that further use of department resources is not warranted, or because the commissioner has determined that there is no probable cause to credit the allegations contained in a charge filed with the commissioner; (2)

within 45 days after the commissioner has reaffirmed his determination of no probable cause if the charging party requested a reconsideration of the probable cause determination; or (3) after 45 days from the filing of a charge pursuant to section 363.06, subdivision 1 if a hearing has not been held pursuant to section 363.071 or if the commissioner has not entered into a conciliation agreement to which the charging party is a signator. The charging party shall notify the commissioner of his intention to bring a civil action, which shall be commenced within 90 days of giving the notice;

(c) The commissioner may dismiss, without prejudice to the charging party, any case filed with the department on or before June 30, 1978. The commissioner shall notify a charging party by regular mail sent before August 1, 1981, that he has a right to bring a civil action pursuant to this section. Upon giving this notice the commissioner shall end all proceedings in the department relating to the charge. Notwithstanding any statutory period of limitation to the contrary, an individual notified pursuant to this clause may bring a civil action relating to his charge; provided that the action is filed on or before February 1, 1982.

A charging party bringing a civil action shall mail by registered or certified mail a copy of the summons and complaint to the commissioner, and upon their receipt the commissioner shall terminate all proceedings in the department relating to the charge. No charge shall be filed or reinstituted with the commissioner after a civil action relating to the same unfair discriminatory practice has been brought unless the civil action has been dismissed without prejudice.

Upon application by the complaining party to the district court at a special term and under circumstances the court deems just, the court may appoint an attorney for the person and may authorize the commencement of the action without payment of fees, costs, or security.

Upon timely application, the court may permit the department to intervene in a civil action brought pursuant to this section upon certification that the case is of general public importance.

Subd. 2. District court jurisdiction. Any action brought pursuant to this section shall be filed in the district court of the county wherein the unlawful discriminatory practice is alleged to have been committed or where the respondent resides or has his principal place of business.

Any action brought pursuant to this chapter shall be heard and determined by a judge sitting without a jury.

If the court finds that the respondent has engaged in an unfair discriminatory practice, it shall issue an order directing appropriate relief as provided by section 363.071, subdivision 2.

Subd. 3. Attorney's fees and costs. In any action or proceeding brought pursuant to this section the court, in its discretion, may allow the prevailing party, other than the department, a reasonable attorney's fee as part of the costs.

* * *

Supreme Court, U.S.
FILED
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No. 85-532

IN THE

# Supreme Court of the United States

October Term, 1985

SPORTS AND HEALTH CLUB, INC., d/b/a
LaSalle Sports & Health Club,
Normandale Sports & Health Club,
St. Louis Park Sports & Health Club,
Apache Plaza Sports & Health Club,
Midway Sports & Health Club,
Northland Park Sports & Health Club,
Tonka Sports & Health Club,
Arthur Owens, Marc Crevier, and Forest Larson,
*Appellants,*

v.

STATE OF MINNESOTA, by MARILYN E. McCLURE,
and her successor, IRENE GOMEZ-BETHKE,
Commissioner, Department of Human Rights,
*Appellee.*

ON APPEAL FROM THE
SUPREME COURT OF MINNESOTA

## MOTION TO DISMISS

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IN THE

# Supreme Court of the United States

October Term, 1985

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No. 85-532

---

SPORTS AND HEALTH CLUB, INC., et al.,
*Appellants,*

v.

STATE OF MINNESOTA, by MARILYN E. McCLURE, and her successor, IRENE GOMEZ-BETHKE, Commissioner, Department of Human Rights,
*Appellee.*

---

ON APPEAL FROM THE
SUPREME COURT OF MINNESOTA

---

## MOTION TO DISMISS

---

Appellee moved the Court pursuant to Rule 16(b) to dismiss the appeal herein on the ground that appellants raise no substantial federal questions.

## THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This litigation involves the Minnesota Human Rights Act (the "Act" or "Human Rights Act"), Minn. Stat. §§ 363.01-.14 (1984). The Act provides, *inter alia*, that it is unlawful for an employer to discriminate against employees or prospective employees on the basis of sex, marital status, or religion. Minn. Stat. § 363.03, subd. 1 (1984).[1] It is also a violation of the Act to condition the provision of public accommodations upon religion.[2] Minn. Stat. § 363.03, subd. 3 (1984). The state interest furthered by the Act is securing freedom for its citizens from discrimination in employment and in the provision of public accommodations. Minn. Stat. § 363.12 (1984). The Human Rights Act is reproduced in its entirety in the Appendix to the Appellants' Jurisdictional Statement, A-247-98.

Appellants challenged the Act as being violative of the first amendment of the United States Constitution. That amendment provides that "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise

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[1] The statutory provisions involved are reproduced in appellants' appendix to the Jurisdictional Statement.

[2] The State did not challenge many of appellants' practices, including the placing within the clubs large placards denouncing religious beliefs and practices different from appellants' and displaying Christian literature throughout the clubs. *See Jurisdictional Statement* at 6, A-146-47, No. 85-538 (1985). However, the Administrative Law Judge (hereinafter "ALJ") found a violation of Minn. Stat. § 363.12 (1984) in appellants' treatment of one member who "was intim-[idated], humiliated and ridiculed because of her religious views . . . ." *Id.* at A-144. The ALJ did not certify a class of members and the State did not appeal that determination. Appellants' practices most directly affect employees. Therefore, this brief will focus primarily upon those aspects of this case.

thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, or to petition the government for a redress of grievances."

## STATEMENT OF THE CASE

This case involves a conflict between Minnesota's efforts to shield its citizens from religious discrimination and a corporation's assertion that it can treat its customers, employees, and prospective employees in accordance with the convictions of its officers that are based upon their interpretation of the Bible. The corporation, Sports and Health Club, Inc., (hereinafter "Sports and Health") is owned and operated by Arthur Owens, Marc Crevier, and Forest Larson (hereinafter "appellants"). There are seven Sports and Health facilities in the Minneapolis-St. Paul area employing approximately 140 people and serving approximately 18,000 members. *State, by McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 846 (Minn. 1985). Each club offers memberships to the general public. Members may use any of the seven facilities' exercise equipment and participate in physical exercise classes. Members may receive counselling regarding diet and exercise. At each club there is a manager, assistant manager, and several associate membership directors. The duties of associate membership directors include selling memberships, structuring exercise and diet programs for members, and leading exercise classes. *Id.*

Appellants claim that every aspect of their lives, including decisions regarding the operation of Sports and Health, is regulated by the teachings of Jesus Christ contained in the Scriptures. *Jurisdictional Statement* at 5-6, No. 85-535 (1985). Thus, they require managers and assistant managers to attend weekly Bible-study classes during business hours; they

refuse to hire a single person living with a member of the opposite sex; and they fire good, hardworking employees merely because they refuse to participate in appellants' religious practices. *State, by McClure v. Sports and Health Club, Inc.*, 370 N.W.2d at 846-47. Appellants claim that because these judgments and actions are based upon how they believe Jesus Christ, speaking through the Scriptures, has instructed them to act, they are insulated from regulation by the Act insofar as it mandates contradictory behavior.[3] They assert that the religious neutrality required of a business towards its customers and employees by the Act is an unconstitutional burden upon appellants' ability to freely exercise their religion.

Appellants' discriminatory practices were found in violation of the Human Rights Act and enjoined by a state ALJ on April 26, 1984. The Minnesota Supreme Court affirmed the orders of the ALJ in a decision issued May 17, 1985.[4] *State, by McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844 (1985). On June 28, 1985, that court denied appellants' motion for a rehearing. A notice of appeal to this Court was filed on July 26. Justice Blackmun rejected appellants' motion for a stay on September 10, 1985. Appellants filed their Jurisdictional Statement on September 25, 1985.

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[3] The State's action seeks to enjoin appellants from engaging in discriminatory conduct and to compensate persons injured by that conduct. The State's interest is in prohibiting conduct that violates the Act. The State did not initiate this action against appellants because of their religious views. Appellants raise their religious beliefs as justification for their conduct. The religious nature of their actions does not by itself trigger application of the Act.

[4] The court also remanded the case for certification of a class earlier rejected for certification by the ALJ. 370 N.W.2d at 844.

## ARGUMENT

### APPELLANTS PRESENT NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

Appellants contend that because the religious beliefs that dictate their employment practices are sincerely held, they are entitled to constitutional protection under the first amendment.[5] Because prior decisions of this Court so firmly establish the correctness of the Minnesota Supreme Court's decision rejecting appellants' contention, this appeal raises no substantial federal question.

This Court has declared that while the freedom to believe is protected as an absolute right, the functioning of an orderly society requires that an individual's right to practice his religion be subjected to reasonable regulation by the state. *See Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). Using a three-part test developed by this Court, the Minnesota

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[5] As they did in the state courts, appellants continue to claim the ALJ's orders violate the free speech, free exercise, and free association clauses of the first amendment. However, appellants have never, and do not now, raise any legal argument supporting their association and speech claims. Therefore, this motion will address only those arguments considered by the court below and raised for consideration before this Court.

Appellants also claim a violation of the establishment clause of the first amendment. They claim that enforcement of the Human Rights Act results in the establishment of a state religion of "secularist beliefs." *Jurisdictional Statement* at 25, No. 85-532 (1985). As this Court stated in *Bob Jones University v. United States*, 461 U.S. at 604-05, n.30 (1983), "a regulation does not violate the Establishment Clause merely because it 'happens to coincide or harmonize with the tenets of some or all religions.'" (Citation omitted.) So long as the regulation has a neutral, secular basis, does not cause excessive entanglement with religion, and does not advance or inhibit the exercise of religion, there is no violation of the establishment clause. *Id.*

Supreme Court held that the regulation at issue in this case is reasonable and does not, as appellants contend, impose an unconstitutional burden upon appellants' free exercise of religion. *State, by McClure v. Sports and Health Club, Inc.*, 370 N.W.2d at 851-52. That test requires, first, a determination of whether the statute imposes a burden upon appellants' constitutional rights; second, whether that burden is justified by a compelling governmental interest; and, third, whether the regulation is the least restrictive means to achieve the state's goals. *Bob Jones University v. United States*, 461 U.S. 574, 603-04 (1983); *United States v. Lee*, 455 U.S. 252, 257 (1982); *Thomas v. Review Bd. of Indiana Employment Sec.*, 450 U.S. 707, 718 (1981).

In applying this Court's standards to the present case, the Minnesota Supreme Court determined that although the state's actions abridged appellants' sincerely held beliefs, the government's interest in prohibiting discrimination is overriding and compelling. 370 N.W.2d at 852. The Minnesota court further held that the state's goals would be frustrated substantially by use of any lesser restrictive means. *Id.* at 853.

Appellants seek review by this Court of a state court decision prohibiting appellants from continuing the practices enjoined by the ALJ. Those practices include asking job applicants whether they are Christian, are willing to speak freely about religion to other people, are planning to have children, read the Bible, pray, or attend church. Single female applicants are asked if they have their father's consent to work; married female applicants are asked if they have their husband's consent.[6] 370 N.W.2d at 846-47. Single applicants who live with a member of the opposite sex are not considered for

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[6] Without such consent, these women would be denied employment. *Id.* at 847.

employment. All employees are requested repeatedly to attend weekly Bible study sessions. No one who fails to espouse a born-again Christianity consistent with appellants' beliefs and practices will be promoted into management despite relevant qualifications. 370 N.W.2d at 847. It is these practices that appellants claim are constitutionally protected. It is these practices that the ALJ and the Minnesota Supreme Court declared must be enjoined. Based upon the prior decisions of this Court, the Minnesota court did not err in its decision.

The fact that appellants' practice of their religion is burdened by application of the Act does not mean that they must be exempted. This Court has declared that a burden upon religious liberty may be justified "by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd. of Indiana Employment Sec.*, 450 U.S. 707, 718 (1981). The compelling nature of Minnesota's interest in eliminating discrimination against its citizens is a goal "of the highest order." *Roberts v. United States Jaycees*, 104 S.Ct. 3244, 3253 (1984). When presented with such an overriding state interest, this Court has permitted regulation of religiously based conduct. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), this Court upheld the denial of tax exempt status to an educational institution practicing racial discrimination despite a finding that the institution's practices resulted from sincerely held religious beliefs. *Id.* at 603-04. Similarly, the government's interest in procuring manpower for military purposes outweighs a conscientious objector's religiously motivated opposition to a particular war. *Gillette v. United States*, 401 U.S. 437, 462 (1971). The state interest in this case of eliminating religious discrimination in employment and public accommodations is equally compelling.

Not only is the state's goal overriding and compelling, but there are no less restrictive means available to serve that interest. Because the state's goal is the elimination of discrimination in employment, there is no way that interest can be furthered effectively without enjoining appellants from continuing their discriminatory practices. Money damages cannot compensate adequately. The state is not only interested in compensating individuals who have been and will be injured by appellant's conduct; the state is interested also in forbidding that conduct, precluding its recurrence. The eradication of discrimination in employment and in the provision of public accommodations cannot be achieved by any lesser means.

Appellants' Jurisdictional Statement fails to demonstrate any flaw in the reasoning of the Minnesota Supreme Court or any error or omission by that court in applying the decisions of this Court. Indeed, even the dissenting opinions were unable to articulate a manner in which a decision favorable to appellants could be reconciled with the law as established by this Court. *State, by McClure v. Sports and Health Club, Inc.*, 370 N.W.2d at 854-77 (Peterson, J. and Yetka, J., dissenting).

To permit appellants to continue to operate their secular business in violation of state law would permit them to continue to force their religious views upon their employees. " 'The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.' " *Thornton v. Caldor, Inc.*, 105 S.Ct. 2914, 2918 (1985) (*quoting with approval, Otter v. Baltimore & Ohio R.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (Learned Hand, J.)). Appellants' conduct clearly is beyond the bounds of protection afforded by the first amendment as articulated by this Court.

## CONCLUSION

Appellee respectfully submits that the decision of the Minnesota Supreme Court closely follows all relevant decisions of this Court and, thus, appellants' cause raises no substantial federal question. Appellee, therefore, respectfully moves this Court to dismiss this appeal.

Dated: October 25, 1985.

Respectfully submitted,

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